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1905.

THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

Probate Division.

COURTS OF PROBATE, DIVORCE, AND ADMIRALTY,

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL;

ALSO DECISIONS IN THE

ECCLESIASTICAL COURTS.

EDITOR—SIR FREDERICK POLLOCK, BART., *Barrister-at-Law.*
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1905.

LONDON:
Printed and Published for the Council of Law Reporting
BY WILLIAM CLOWES AND SONS, LIMITED,
DUKE STREET, STAMFORD STREET, S.E., AND GREAT WINDMILL STREET, W.
PUBLISHING OFFICE, 7, FLEET STREET, E.C.

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OF

THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION

OF

THE HIGH COURT OF JUSTICE.

1905.

The Right Hon. Sir Francis Henry Jeune, Knt.,
The Right Hon. Sir John Gorell Barnes, Knt.,
Presidents.
The Hon. Sir Henry Bargrave Deane, Knt.

JUDGES

OF

THE COURT OF APPEAL.

1905.

Earl of Halsbury, Lord Chancellor.
Lord Alverstone, Lord Chief Justice of England.
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Sir Francis Henry Jeune, Sir John Gorell Barnes,	Presidents of the Probate, Divorce and Admiralty Division.
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[1905] 1 Ch. [1905] 2 Ch.

In the Second Series,
[1905] 1 K. B. [1905] 2 K. B. [1905] P.

In the Third Series,
[1905] A. C.

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CASES

DETERMINED BY THE

PROBATE DIVORCE AND ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS

1904—1905.

DEAN *v.* BULMER.

1904
Nov. 15, 16, 17, 18.

Probate—Practice—Costs—New Rule—Rules of Supreme Court, Order LXV., *r.* 14 (*d*).

Under the additional rule (Order LXV., r. 14 (*d*)) (1), the Court ordered the costs of both plaintiff and defendant to be charged on and paid out of the corpus of certain real estate devised by the will to successive life tenants.

[In another case, the costs of all parties were ordered to be paid out of the residuary shares of four defendants (there being six in all, interested under the will in the residuary estate of the testator), these four defendants being held to have caused the litigation.]

Ralph Bulmer, the testator, died on August 28, 1903.

By his will dated April 17, 1903, he appointed two executors (both of whom renounced probate), and devised to the tenant of 59, Alexandra Road, Leeds, the said cottage for life, and, subject thereto, to his son Henry Bulmer (the defendant) during the term of his natural life. The testator devised to his said son the shop and premises adjoining 59, Alexandra Road, subject to certain conditions. Upon the death of his said son, the testator directed the Alexandra Road property to be sold and the proceeds of such sale to be divided between his nephews and nieces. The house, No. 21, Norwood Road, Headinley, in the city of Leeds, together with the furniture and effects therein, the testator gave to his housekeeper as a mark of appreciation for her attention to him.

---

(1) Order LXV., r. 14 (*d*), is as follows: "In any probate action in which it is ordered that any costs shall be paid out of the estate, the judge making such order may direct out of what portion or portions of the estate such costs shall be paid, and such costs shall be paid accordingly."

By the codicil dated April 30, 1903, the gifts to the housekeeper were revoked, and the proceeds of sale of the property comprised in such gifts were given to the testator's nephews and nieces.

The plaintiff, William Dean, as a lawful nephew of the testator and one of the residuary legatees named in his last will and codicil, claimed to have the said will and codicil, dated respectively April 17, 1903, and April 30, 1903, pronounced for in solemn form of law.

The defendant, as the natural and lawful son of the deceased and the sole executor and universal legatee named in an earlier will, dated December 18, 1901, opposed the claim of the plaintiff, on the grounds of alleged undue execution of the last will and codicil; the alleged unsoundness of mind of the deceased; and want of knowledge and approval by the deceased of the contents of the last will and codicil; and he counter-claimed probate of the earlier will.

The plaintiff, in reply, joined issue on the defence, and, by way of defence to the counter-claim, pleaded revocation of the earlier will by the execution of the will and codicil propounded by the plaintiff.

The Court pronounced for the last will and codicil.

Dickens, K.C., and *Barnard*, for the defendant, asked for costs out of the estate.

Bargrave Deane, K.C., and *Rayden*, for the plaintiff. Costs should follow the event, and, under the new rule (1), they should come out of the defendant's interest under the will. He takes the bulk of the property for life. The residue amounts only to about 600*l*.

---

(1) Ante, note (1), p. 1.

JEUNE P. Under the new rule (1), the Court has power now to order the costs to be paid out of any part of the estate, which power, I think, extends as well to life interests as to capital sums forming portions of the estate. In the present case, I think the right order to make is that the costs of both sides be charged on and paid out of the Alexandra Road property, the effect of this being that the defendant's life interest will be liable for keeping down the interest on the charge, and, on the defendant's death, the charge will be paid off out of the proceeds of sale of that estate, or the amount may be raised by a mortgage of the property.

Solicitors for plaintiff: *Bell, Brodrick & Gray, for H. Appleton, Leeds.*

Solicitors for defendant: *Waddy & Kelsey, for H. A. Child, Leeds.*

NOTE.—In the case of *Harrington* v. *Butt* (November 11) Gorell Barnes J., in pronouncing for the will, ordered that the costs of all parties be paid out of that portion of the residuary estate passing under the will to four out of six defendants.

For the plaintiff: *Germaine, K.C.*, and *R. H. Pritchard.*

Solicitors: *Beyfus & Beyfus.*

For the defendants (other than George Chandler Butt and Stephen Butt): *Kisch.*

Solicitors: *R. Furber & Son.*

For the defendant George Chandler Butt: *Bargrave Deane, K.C.*, and *Barnard.*

Solicitors: *Stileman & Neate.*

H. D. G.

---

(1) Ante, note (1), p. 1.

1904
Nov. 8, 9.

SQUIRE *v.* SQUIRE AND O'CALLAGHAN.

Divorce—Adultery of the Wife—Cruelty of the Husband—Discretional Bar—Matrimonial Causes Act, 1857 (20 *&* 21 *Vict. c.* 85), *s.* 31—*Allowance to be secured to guilty Wife—Restrictive Conditions—Dum casta et sola vixerit.*

The Court, in exercising its discretion in favour of and granting a divorce to a husband who had previously been judicially separated on the ground of his cruelty, ordered that the decree dissolving the marriage should not be made absolute unless and until the husband should secure an allowance of 52*l.* a year, payable weekly, to the divorced wife.

The principles which guide the Court in ordering an allowance in such cases, and the rules which lead the Court to determine on the insertion of a dum sola et dum casta clause, considered and discussed.

THIS was the husband's petition for divorce on the ground of his wife's adultery with the co-respondent.

The respondent filed an answer denying the adultery. The co-respondent entered an appearance to the citation, but filed no answer, and was not present or represented at the hearing.

The petitioner and respondent were married in 1889, and on December 4, 1900, the wife obtained a decree of judicial separation on the ground of her husband's cruelty.

Permanent alimony at the rate of 3*l.* per week was subsequently allotted and paid to her.

The petitioner had his wife watched on more than one occasion between the date of the decree for judicial separation and the date of the present petition, which he filed on March 8, 1904. In this petition he alleged that she had committed adultery with the co-respondent in February and March, 1904, and that on a specific occasion, namely, March 5, 1904, adultery was committed by them at the house where the respondent resided.

The President having intimated that he found that adultery on March 5, 1904, was established, as appears shortly in the judgment—

Barnard, for the petitioner, asked the Court to exercise the discretion conferred by the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 31, in favour of the petitioner, and to grant him a decree dissolving the marriage. The cruelty of the petitioner has not led to the adultery of the respondent: *Pryor* v. *Pryor, Cowie, and Macdonald* (1); *Edwards* v *Edwards and Francis.* (2)

Durley Grazebrook, for the respondent. The Court having found the adultery proved, it may be the more merciful view to allow the decree to go, imposing, however, a condition that the husband shall make a provision for the wife. It is submitted that 2*l.* a week would be a proper amount to fix under all the circumstances. The allowance should not be subject to any restrictive clause: *Lander* v. *Lander.* (3) The husband's conduct in that case was not so bad as in the present instance, while the wife's misconduct there was far worse than here. In cases where the Court exercises its discretion in favour of a husband whose conduct is blameworthy, the allowance which he is ordered to make to the wife is a condition and, as it were, the price of his decree, and he ought to secure such allowance to the wife in any event. The late Sir Charles Butt repeatedly stated in this Court that he had set his face against the dum casta clause on the ground that it was a premium to the husband to harass his divorced wife by having her watched in order to try and get rid of his liability to pay the allowance; and even where such a clause was assented to on behalf of the wife, he hesitated to allow its insertion: *Weller* v. *Weller, Funnell, and Cass.* (4) On the other hand, where the Court orders a compassionate allowance to be paid to a guilty wife by a husband whose conduct is irreproachable, it is only right and proper that the allowance should be payable only dum casta et sola vixerit: *Ashcroft* v. *Ashcroft and Roberts.* (5)

Barnard, in reply. The petitioner will pay 1*l.* a week. It is submitted that that is sufficient, and that it ought to be payable only while she remains chaste and unmarried.

JEUNE P. I have been asked to approach the consideration of this case with great care and even with suspicion.

(1) [1900] P. 157.
(2) [1894] P. 33.
(3) [1891] P. 161.
(4) (1890) 63 L. T. 263.
(5) [1902] P. 270.

The husband had, no doubt, a strong motive, namely, to get rid of the alimony he was ordered to pay to his wife; but I hope that motive was not strong enough for the concoction of false evidence, though undoubtedly strong enough to lead him to try and obtain true evidence, and so to get rid of his wife and of his obligation to support her.

I do not think that the question of drink goes very far in this case. It may be very important in some cases, especially in cases of cruelty or in regard to charges of such gross adultery as are sometimes investigated in this Court.

The main fact in the present case is that the co-respondent went to live in the respondent's house. That appears to be the crucial matter. The respondent's father may have known the man, and it may be true that the man was there assisting to nurse the father in the latter's fatal illness; and this may, moreover, explain how it came about that the respondent became on intimate terms of acquaintanceship with him. But she subsequently took this man O'Callaghan into her house as a friend, and the fact of her doing so leads to the inference that she had unfortunately contracted an affection for him.

The test I feel inclined to apply is one of almost universal application, namely, what did the persons do and say at the critical moment on March 5, and how is their action or demeanour at that moment to be reconciled with one view or the other of the set of facts, which, at the time the two private detectives entered the house, are more or less admitted. [The learned judge then reviewed the evidence.]

Looking at all the circumstances, I am reluctantly led to the conclusion that the respondent and co-respondent were caught by the two detectives practically in the act, and I must therefore find the charge of adultery established.

Then comes the question which has caused me a good deal of anxiety because the authorities on the subject are not so clear as I could wish, and a great responsibility has to be taken by the Court in determining whether to grant or withhold a decree dissolving the marriage. The facts are undoubted. In 1900 the husband was convicted of cruelty, and, taking the charges in the wife's petition to have been true—and some of them were clearly proved on that occasion —the cruelty was of an aggravated character. The case against him was proved and cannot be gone into again. Then ought I, on that ground, to refuse him the relief which he now seeks? I must not allow myself to be influenced to any great extent by the feeling that it would be a very sad thing to refuse a divorce. The result of doing so would be, as I pointed out in the case of *Pryor* v. *Pryor, Cowie, and Macdonald* (1), the deplorable position in which both parties would find themselves. In delivering judgment in that case I said: "If, on the one hand, the Court should decide to refuse a decree, it incurs the great responsibility of leaving the parties in a deplorable condition: the husband is tied to a woman who has been found guilty of adultery and with whom he cannot be expected to live: the wife is in a similar or rather worse position. She cannot compel her husband to maintain her, or pledge her husband's credit for necessaries; neither can she appeal to this Court for restitution of conjugal rights with the object of obtaining support from him; nor can she avail herself of the Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39). That is a state of things for which the Court should hesitate to take the responsibility, and which it should, if possible, avoid." At the same time, the Court must act according to some principle, and I think the principle is that the cruelty of the husband must be shewn to have conduced in some way or other to the adultery of the wife, though I do not go so far as to say that it must be shewn to have caused it. It was at this point that my hesitation became serious, because it well may be argued in this case that the cruelty of the husband conduced to the adultery of the wife. His conduct undoubtedly caused the separation; and the effect of that separation was that the husband relinquished or lost that control and care of the wife which it is the duty of every husband to exercise, and which it is the wife's right to have. Broadly speaking, there is no doubt that this husband's cruelty caused his wife to lose the protection of a husband and alienated her affection from

(1) [1900] P. 157.

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him. But then, on the other hand, I doubt how far that argument ought to be carried; and, after a good deal of hesitation, I have come to the conclusion that the prayer of the husband in the present petition ought not to be refused, because, although I think that the husband's past conduct may have caused his wife to lose that protection and care which she, as a wife, was entitled to, still her subsequent course of conduct has been so mistaken and, in a certain sense, so gross, that I am afraid it was caused, not by his former cruelty towards her, but by her own inherent wickedness. There was, therefore, no direct causation of her adultery. Her adultery was not caused, directly at any rate, by his cruelty, but was brought about because she was tempted and yielded to the temptation. The discretion conferred upon the Court must always be exercised with great care, and, in taking the course I am about to take, I do so not without a good deal of doubt and hesitation. On the whole, I have come to the conclusion that I shall best fulfil the duty cast upon me by the Legislature in granting, not in withholding, a decree in this case.

There remains, however, the further point, in which I have the advantage of previous decisions to guide me. I certainly think that the petitioner ought to make the respondent an allowance, and I think the ground for that is that the respondent should not be caused, by being left without some allowance, to pursue a course of life which I should much regret if she were led to pursue. She ought to be preserved from imminent temptation. In this connection I do not lay much stress on the husband's past conduct towards his wife. In my view, the main ground for ordering him to make her an allowance is not his own conduct in the past, but that she may be reasonably safe from the terrible temptation which might otherwise assail her. The conduct of the husband is not, in my view, materially in issue in dealing with this matter. But, in the view I take of this class of case, it is material that the dum casta clause should be inserted. The wife should know and should be made to feel that her livelihood depends on her leading a chaste life in the future. In

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cases where the wife has not been proved to have committed adultery I should be slow to insert the dum casta clause. But, where the wife is proved guilty of adultery, I am of opinion that the strongest pressure ought to be put upon her not to lapse again into sin. I cannot bring myself to believe that Sir James Hannen could have intended as a consequence of his decision in *Lander* v. *Lander* (1) that a husband should be called on to support a wife who was leading a life of prostitution. Although I do not lay so much stress upon the dum sola clause, I think that too ought to be inserted, and that the husband ought not to be called on to contribute to the support of his divorced wife if she should become the wife of another man.

The husband has suggested the sum of 1*l.* a week, and the order I make in pronouncing a decree nisi in this case is that the decree be not made absolute unless and until the petitioner has secured to the respondent an allowance of 52*l.* a year, payable weekly, dum sola et casta vixerit.

If any question arises as to the inability of the petitioner to provide the necessary security, either party may have liberty to apply to me in chambers.

There will, of course, be the usual order for the wife's costs.

Solicitors for petitioner: *Stow, Preston & Lyttelton, for Friend & Tarbet, Exeter.*

Solicitors for respondent: *Baker, Baker & Co., for Dunn & Baker, Exeter.*

Solicitors for co-respondent: *Robins, Billing & Co.*

H. D. G.

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(1) [1891] P. 161.

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Nov. 22, 23, 24.

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Admiralty—Collision—Sea Reach, River Thames—Starboard Hand Buoys—Narrow Channel—Regulations for Preventing Collisions at Sea, 1897, *art.* 25.

The plaintiffs' steam vessel proceeding up, and the defendants' steam vessel going down, the river Thames, came into collision on the starboard side, as regards the incoming vessel, of the channel which lies to the southward of the four red conical lighted buoys, placed by the duly constituted authority, approximately in the central line of Sea Reach, to mark the northern side of the deepest water. On the question whether the plaintiffs' vessel was on the wrong side of the river :—

Held, by Gorell Barnes J., that the effect of the placing of the four red conical lighted buoys was to constitute the space of water between them, and the Nore Sand buoys to the south of them, a narrow channel within the meaning of art. 25 of the Regulations for Preventing Collisions at Sea, for, by the uniform system of buoyage adopted on the coast of England, red conical buoys are "starboard hand buoys" denoting that side which would be on the right hand of the mariner entering the river, and, therefore, the plaintiffs' vessel was justified in being where she was.

Quære, as to the effect of the starboard hand buoys with reference to that portion of the waterway between those buoys and the buoys on the northern side of the river.

ACTION of damage by collision.

The plaintiffs were the Société Anonyme John Cockerell of Antwerp, Belgium, owners of the steam vessel *Rubis*. The defendants were the owners of the Swedish steam vessel *Gustafsberg.*

The case is reported on the question of the effect of the Trinity House placing starboard hand buoys to mark the northern side of the deepest water through Sea Reach in the river Thames with reference to art. 25 of the Regulations for Preventing Collisions at Sea, 1897. (1)

The facts were shortly as follows :—

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(1) Art. 25: "In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel."

On August 3, 1904, about 10 P.M., the twin-screw steamship *Rubis*, of 633 tons gross register, engines of 388 horse power nominal, and manned by a crew of 16 hands, was proceeding, on a course of N.W. by W. ½ W. magnetic, up Sea Reach of the river Thames to the south of, and above, No. 1, and below No. 2, red conical gas buoys, on a voyage from Ostend to Tilbury with a general cargo and one passenger. The weather was fine and clear with no wind, and the tide was ebb of the force of nearly two knots. The *Rubis* was making about twelve knots over the ground with her engines working full speed, when those in charge of her observed the two masthead lights and green light of the *Gustafsberg*—a screw steamship of 1155 tons gross register, and a crew of 20 hands with a coasting pilot, or waterman, assisting the master, and bound from the Surrey Commercial Dock to Blyth in ballast—about two miles distant bearing a little on the port bow. The *Rubis* kept her course and speed, and the masthead and green lights of the *Gustafsberg* gradually drew ahead and on to the starboard bow, when the *Rubis*, having arrived off the No. 2 buoy, and the vessels being starboard to starboard, the helm of the *Rubis* was starboarded to get on a W.N.W. magnetic course parallel with the line of the No. 2 and No. 3 buoys, and two short blasts were at the same time sounded on her whistle. The *Rubis* was steadied on this course, and the other vessel continued to approach green to green for a short time broadening on the starboard bow; but, as she got nearer, those in charge of the *Rubis* alleged that the *Gustafsberg* suddenly opened her red light on the starboard bow of the *Rubis* and sounded one short blast on her whistle. The engines of the *Rubis* were immediately stopped and reversed, three short blasts being sounded on the whistle; but the *Gustafsberg* shut in her green light, and the two vessels came into collision, the stem of the *Rubis* striking the *Gustafsberg* on her port side about amidships. The place of the collision according to the preliminary act of the plaintiffs, and as found by the Court, was "above the No. 2 and below the No. 3 red conical lighted buoy, and to the south of the line of the same and on the starboard side of the channel which lies between the Nore Sand

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buoys and the red conical lighted buoys." (1) These buoys being conical in shape and coloured red are "starboard hand buoys"—that is, they indicate, in the case of entering the river Thames, that side which is on the right hand of the mariner. (2)

The defendants alleged that the *Gustafsberg* was proceeding down Sea Reach at about eight or nine knots through the water, heading about E b S. ½ S. magnetic, and that she was on the south side of mid-channel, having shortly before passed well to the southward of No. 4 occulting gas buoy, when those in charge observed the two masthead lights of the *Rubis* about five miles off, about ahead and slightly on the starboard bow. The red and green side lights then came in sight on about the same bearing. Shortly afterwards the green light was shut in, whereupon the helm of the *Gustafsberg* was ported half a point

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(1) With reference to these buoys the following "Notice to Mariners" was issued on May 6, 1904, by the Trinity House, London:—

"It is intended, on or about July 7 next, to place *Four Red, conical, lighted buoys* to mark the *Northern side* of the deepest water through *Sea Reach*. The width of the deepest water is at present about 650 feet. The buoys will be named *Sea Reach* numbered from seaward 1 to 4, and will lie in about 26 feet at low water Spring Tides.

"No. 1 will be situated approximately South 2 miles 5½ cables from St. Andrews Church Shoeburyness and will shew a light giving two white flashes about every ten seconds.

"No. 2 will be situated approximately S. ¾ E. 1 mile 3 cables distant from Southend Pier Light, and will shew a white light giving one occultation about every ten seconds.

"No. 3 will be situated approximately N.E., 1 mile 6 cables from Yantlet Beacon, and will shew a light giving two white flashes about every ten seconds.

"No. 4 will be situated approximately N. ½ W. wly. 1 mile 5 cables from Yantlet Beacon, and will shew a white light giving one occultation about every ten seconds.

"The light on the *East River Middle Buoy* will at the same date be discontinued, and the Spherical Buoy thereat (painted in black and white horizontal bands) will be surmounted by a diamond top-mark. Further notice will be given when the above changes have been made."

(2) The Channel Pilot, Part I., South Coast of England, 9th edit. Published by order of the Lords Commissioners of the Admiralty, London, 1900, p. 29.

"*Uniform system of buoyage.*

"The system of buoyage adopted on the coast of England is as follows:—

"1. The mariner when approaching the coast must determine his position on the chart, and must note the direction of the main stream of flood tide,

"2. The term Starboard Hand shall denote that side which would be on and steadied, the vessels being then red to red and in a position to pass port side to port side, the red light of the *Rubis* gradually broadening on the port bow; but when the *Rubis* was about a mile off, and one to one and a half points on the port bow of the *Gustafsberg*, she suddenly opened her green and shut in her red light. The whistle of the *Gustafsberg* was sounded one short blast and her helm ported. The whistle was again sounded and the helm put hard-a-port, but the *Rubis* still keeping her green light open, the whistle of the *Gustafsberg* was sounded a long blast and her engines slowed. On the *Rubis* sounding three short blasts the engines of the *Gustafsberg* were stopped; but the collision occurred, causing damage to the *Gustafsberg*, in respect of which her owners counter-claimed.

Each side charged the other with (inter alia) a breach of art. 25, the plaintiffs, the owners of the *Rubis*, alleging that the *Gustafsberg* "neglected to keep to her starboard side of the channel," whilst the defendants, the owners of the *Gustafsberg*, alleged that the *Rubis* "improperly failed to keep to that side of the fairway or mid-channel which lay on her starboard

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the right hand of the mariner either going with the main stream of flood or entering a harbour, river or estuary from seaward; the term Port Hand shall denote the left hand of the mariner under the same circumstances.

"3. Buoys shewing the pointed top of a cone above water shall be called Conical, and shall always be Starboard Hand buoys as above defined.

"4. Buoys shewing a flat top above water shall be called Can, and shall always be Port Hand buoys as above defined.

"5. Buoys shewing a domed top above water shall be called Spherical, and shall mark the ends of middle grounds.

"6. Buoys having a tall central structure on a broad base shall be called Pillar buoys, and like other special buoys, such as Bell buoys, Gas buoys, Automatic Sounding buoys, &c., &c., shall be placed to mark special positions either on the coast or in the approaches to harbours, &c.

"7. Buoys shewing only a mast above water shall be called Spar buoys.

"8. Starboard Hand buoys shall always be painted in one colour only.

"9. Port Hand buoys shall be painted of another characteristic colour either single or parti-colour. . . .

"*Colouring of Buoys.*—In carrying out the above uniform system, the colours adopted by the Trinity House London, Admiralty, and principal harbour authorities, are whole colours on the starboard hand and parti-colours on the port hand."

side." A witness from the Nore Lightship stated that the practice was for both inward and outward bound vessels to treat the waterway between the red conical buoys, and the buoys on the south shore, as a narrow channel, only one-third of the total traffic going to the northward of the red buoys.

Laing, K.C., and *Dawson Miller*, for the plaintiffs, the owners of the *Rubis*. The *Gustafsberg* is to blame, first because those in charge of her improperly ported when the vessels were green to green; secondly, because that vessel was on the wrong side of the channel; and, thirdly, because her engines ought to have been stopped and reversed sooner than in fact they were. As to the second point. The channel, along the starboard side of which the *Rubis* was properly proceeding, lies between the red conical lighted buoys on the north side and the Nore Sand on the south side. It may be that the effect of placing the red conical buoys is to make two channels, one to the northward of those buoys for light-draught vessels, the other to the southward for deep-draught vessels; still those in charge of the *Rubis* were justified in treating the waterway between the red conical buoys and the buoys on the south shore as a narrow channel within the meaning of art. 25, and keeping to that side of it which lay on their starboard hand, altering the course when necessary, so as to maintain the same parallel position with regard to the buoys which are not quite in line. The evidence is that two-thirds of the traffic up and down the river treat this space of water to the southward of the red conical buoys as a narrow channel.

Aspinall, K.C., and *Stubbs*, for the defendants, the owners of the *Gustafsberg*. The plaintiffs' vessel, the *Rubis*, was wrong in starboarding; secondly, she was in her wrong water; and, thirdly, she kept on at high speed until too late. As to the second point. The four red conical lighted buoys only mark, in the terms of the notice, "the northern side of the deepest water through Sea Reach," and, therefore, there is only one "fairway or mid-channel" within the meaning of art. 25, of which the centre is approximately occupied by the red buoys.

In *The Blue Bell* (1) "fairway" was interpreted to mean "a clear passage way by water," that is, "an open navigable passage used by vessels proceeding up or down a river or channel," and it may be inside a row of buoys placed to mark the edge of deep water. In that case the collision occurred above and inside the West Blyth buoy, which is a little higher up Sea Reach, where the Thames by-laws are applicable, and, in the judgment of the Divisional Court, it is stated that "the West Blyth and the Middle Blyth buoys mark the southern boundary of the channel commonly used by large vessels of deep draught; but they are put there simply as marks to indicate the extent of the deep-water channel, and there is no regulation to forbid vessels navigating inshore of the buoys." Similar reasoning applies to the buoys in the present case. It is true that in *The Corennie* (2) the Court held that steam vessels should pass to the southward of the Swin Middle Lightship, and this was approved by the Court of Appeal in *The Minnie* (3); but in *The Oporto* (4) it was held that, as the North-east Maplin buoy had been made an occulting gaslight buoy, reliance could no longer be placed on those two cases, and the Swin Middle Lightship was to be treated as midway in a narrow channel, so that inward-bound steam vessels should pass to the northward and outward-bound steam vessels to the southward of the lightship, and that, it is submitted, is the case here in respect of the buoys marking the northern side of the deepest water; so that the *Rubis* was in her wrong water, and should, therefore, be held to blame as having infringed art. 25.

[GORELL BARNES J. These being starboard hand buoys would be so treated by an incoming vessel.]

Before these red conical buoys were placed approximately down the centre line there were, and still are, buoys on the north and on the south side of the river marking the navigable channel, that is, the navigable portion of the whole river. The notice states that these lighted buoys were to mark the northern side of the deepest water, and if they went further and, by their shape and colour, indicated a narrow channel to the southward of them, then they were not the appropriate buoys and should not have been placed there, for the result would be that an incoming steam vessel would be entitled to use a much greater space of water than the outgoing steam vessel, which would be restricted to the southern half of the southern channel.

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(1) [1895] P. 242.

(2) [1894] P. 338, n.

(3) [1894] P. 336.

(4) [1897] P. 249.

[Arts. 27 and 29 of the Regulations for Preventing Collisions at Sea, 1897, were referred to.]

Laing, K.C., in reply. If those in charge of an incoming steam vessel had not read the notice, but did see the red conical lighted buoys, they would, according to the uniform practice throughout England, treat them as starboard hand buoys and navigate accordingly.

GORELL BARNES J. [The learned judge, after stating the facts already set out, dealt with the navigation of the two vessels, the whistle signals, and the angle of the blow, and, after consultation with the Elder Brethren of the Trinity House who were assisting him, came to the conclusion that the collision was due to improper porting by the *Gustafsberg*, coupled with not stopping and reversing sooner. The learned judge, therefore, found that vessel alone to blame, and continued:—]

This leaves for consideration one point under the 25th article of the Sea Rules, because it has been agreed on both sides that the collision in this case took place at a spot where the Sea Rules became applicable, being a little lower down than the imaginary line drawn across the river at Yantlet Creek, where the Thames Rules cease to apply. Now, the merits of the case, to my mind, do not depend upon the application of the Sea Rules at all, because it is quite evident that on this fine, clear night, when these vessels saw each other for a long distance, they each were navigating, in fact, for the other, whatever view is taken of the rules, just as if they were in the open sea. So, on the merits of the case, the rule has no practical application; but at the same time there it is, and if it is broken it would be difficult to say that the vessel which broke it was not by any possibility in fault, because if she had not been in the position where she was there would have been no collision. In dealing with the rule, however, the only point necessary for my decision is how far it affects the plaintiffs' vessel, for whether the defendants are right or wrong with regard to their vessel in respect of the starboard hand or narrow channel rule does not matter, because I have found they were to blame for another reason. Now the 25th article provides that in narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel; and it is necessary to see what the navigation at the place of this collision is. It is in a wide part of Sea Reach. Speaking generally, it is opposite Southend, and before the alteration made by the Trinity House—before the placing of the lighted gas buoys—there were buoys on the south side, one of these being the Jenkin buoy, which is now also a gas buoy. There were on the north side of the channel the black buoys—the West River Middle and the River Middle—and there was also the buoy known as the East River Middle, which, as I understand, was a spherical gas buoy; and between the rows of buoys on the north side and the south side the traffic passed; but a short time before this collision the Trinity House placed four gas buoys known as Nos. 1, 2, 3, and 4, in the position shewn on the chart, and took away the light from the buoy called the East River Middle. With reference to these gas buoys, a notice was published on May 6 of the present year as follows: "It is intended on or about July 7 next to place four red, conical, lighted buoys to mark the northern side of the deepest water through Sea Reach. The width of the deepest water is at present about 650 feet. The buoys will be named Sea Reach, numbered from seaward one to four, and will lie in about 26 feet at low water spring tides." Then follows approximately the situation of the buoys, and the notice further says: "The light on the East River Middle buoy will at the same date be discontinued, and the spherical buoy thereat (painted in black and white horizontal bands) will be surmounted by a diamond top-mark." I understand those changes were made on or about July 7, some time before this collision took place.

Now, the buoys that are so put are not only lighted buoys, but they are conical buoys of uniform colour; and that appears to be done in accordance with the uniform system of buoyage on the coast of England, particulars of which are set out in the Channel Pilot. The second of the statements of information—I avoid saying "rules"—as to this system is that "the term 'starboard hand' shall denote that side which would be on the right hand of the mariner either going with the main stream of flood or entering a harbour, river, or estuary, from seaward; the term 'port hand' shall denote the left hand of the mariner under the same circumstances. 3. Buoys shewing the pointed top of a cone above water shall be called Conical, and shall always be Starboard Hand buoys as above defined. 4. Buoys shewing a flat top above water shall be called Can, and shall always be Port Hand buoys as above defined." I need not refer to 5 and 6—they refer to another class of buoy—but No. 8 says: "Starboard Hand buoys shall always be painted in one colour only. 9. Port Hand buoys shall be painted of another characteristic colour, either single or parti-colour." So that, apart from any legal considerations, we have four lighted conical buoys of uniform colour on the right-hand side as vessels go up between those buoys and the south side, and we have on the south side several buoys which are can-shaped—for instance, there is the black and white Chequer, the East Blyth, the Yantlet, &c., all can buoys and parti-colour—and anybody seeing those buoys with knowledge of the locality, guided by the uniform system of buoyage adopted on the coast of England, would at once treat the passage between those two sets of buoys as being a passage on the north of which are starboard hand buoys and on the south port hand buoys, within the meaning of the terms to which I have just referred in that statement of the buoyage system.

It seems to me that the effect of what has been done is that, in accordance with the recognised practice of buoyage, there is indication by means of the buoys of a narrow channel, within the meaning of the 25th article, to the southward of the red conical buoys, and evidence has been given shewing to what extent this indication has been already acted upon. It appears to me that it would not be reasonable, at night at any rate—I am dealing with a night collision, and it is not necessary to go beyond the particular case, so far as my decision is concerned, though my observations may be more general—to hold that a vessel with those distinct starboard hand buoys is to be held to be wrong for treating the southern part of the river between those buoys and the buoys on the southern side as a narrow channel. The cases of *The Corennie* (1), *The Minnie* (2), and *The Oporto* (3) are not directly in point because there are differences which have been pointed out in argument, and to which I need not again refer; but they do go to this extent, that, physical conditions remaining the same, the alteration in lights and other marks which affect the usual way of navigating a particular part does have the effect of making what may be termed a large piece of water into a narrow channel as to part of it, because of the convenience which the marking and lights give for the purpose of navigation.

What the precise effect of this is upon the northern piece which still remains between those lighted buoys which are at present on the northern side of the deepest water and the black buoys, namely, the West and East River Middle, I do not at present feel quite clear; and it is not necessary I should decide whether that is a separate narrow channel or not. There is, however, this difficulty, which I pointed out to counsel for the plaintiffs in the course of their argument, that, having two sets of starboard hand buoys going up river, if vessels going up river acted in accordance with the recognised practice they would treat those buoys as starboard hand buoys; but vessels coming down should not treat them as being other than they are shewn by their form to be, and would require to keep right away to the south side of the river, acting for the port hand buoys. There is that difficulty, and it may well be —I am not sure whether it is or not—that this has the effect of leaving the greater part of the navigable water for vessels going up, and the smaller part of the navigable water for vessels going down. I am not sure at the moment what the exact position is, and it is not necessary I should determine

(1) [1894] P. 338, n.

(2) [1894] P. 336.

(3) [1897] P. 249.

that; but what I think is clear is that if vessels bound by the practice, and by the reason of the thing, do use the south channel, guided by the starboard hand buoys on the one hand and by the port hand buoys on the other, they do treat, and are right in treating, that as a narrow channel. I have asked the Elder Brethren who assist me what their view about that point is, and they consider that as matters stand, and as they stood at the time of this collision, vessels using this channel to the southward of the lighted red buoys do treat, and are right in treating it, as a narrow channel. It may be that the central part of this navigable water of the Thames might have been indicated by buoys of a description which were neither starboard hand nor port hand buoys. That is not a matter on which I feel competent to express an opinion, but it may possibly be that, having regard to certain difficulties which the facts of this case have brought out, the Elder Brethren of the Trinity House may think it well to consider whether matters should remain as they are, or whether the buoys should be such as would merely indicate that the—so to speak—central line of the river there is its central line, and not a line which has a starboard hand character. I must hold that those in charge of the plaintiffs' vessel cannot be held to blame for proceeding as they did, and as the great bulk of the traffic appears to have proceeded, treating these buoys as marking the starboard hand of the narrow channel. The result must be that the *Gustafsberg* is held alone to blame for this collision.

Solicitor for plaintiffs, the owners of the *Rubis*: *Charles E. Harvey*.

Solicitors for defendants, the owners of the *Gustafsberg*: *Stokes & Stokes*.

T. L. M.

THE ASHTON.

1904 Dec. 13, 14.

Admiralty—Collision—Crossing and Narrow Channel Rules—Red Light on the Starboard Bow—Regulations for Preventing Collisions at Sea, 1897, *arts.* 19, 21, 22, 23, 25.

The plaintiffs' steam vessel inward bound to, and the defendants' steam vessel outward bound from, Grimsby, were at the material time red to green in a position of danger, and owing to the incoming vessel hard-a-porting, and the outgoing vessel starboarding, came into collision close to the Clee Ness buoy at the entrance to the river Humber:—

Held, by Gorell Barnes J., that both vessels were to blame, for the waterway at the entrance to the Humber, between the Bull and Clee Ness buoys on the south side, and the buoys on the north side, is a narrow channel within the meaning of art. 25 of the Regulations for Preventing Collisions at Sea, and therefore the plaintiffs' incoming vessel was in her wrong water, and, whether that article applies or not, the nature of the locality and the position of the buoys make it necessary for the incoming vessel to keep well over to the northward, so as to allow the outgoing vessel sufficient room to pass round Clee Ness buoy:

Secondly, as the defendants' vessel was coming out from Grimsby and the plaintiffs' vessel was in the main stream, the two steam vessels were at the material time prior to the collision "crossing so as to involve risk of collision" within the meaning of art. 19 of the same regulations, and, therefore, it was the duty of the defendants' vessel, having the other on her own starboard side, to keep out of the way, for which purpose she should not have attempted, in breach of art. 22, to cross ahead of the other, but should have ported to the red light of the incoming vessel, or, if that were dangerous, owing to the proximity of the Clee Ness buoy, she should have waited until the incoming vessel had passed, whilst that vessel, instead of porting, should, under art. 21, have kept her course and speed, or, assuming that the crossing rule did not apply, then the incoming vessel, on seeing the green light of the outgoing vessel on her port bow in a position of danger, should have stopped and reversed, whilst the outgoing vessel seeing that the red light of the incoming vessel was not broadening on her starboard bow, and, therefore, that she was porting, should at once have stopped and reversed.

Action of damage by collision.

The plaintiffs were the Monarch Steam Fishing Company, Limited, owners of the *King Stephen*. The defendants, and counter-claimants, were owners of the *Ashton*.

The case raised the question as to the proper navigation of incoming and outgoing steam vessels in the Humber, between the Spurn and Grimsby, in view of the crossing and narrow channel sea rules. (1)

On May 11, 1904, about 1 A.M., the steel steam trawler *King Stephen*, of 162 tons gross register, engines of forty horse power nominal, and a crew of nine hands, was in the river Humber in the course of a voyage from the fishing grounds in the North Sea to her home port Grimsby, with a cargo of fish. The wind was north-westerly light, the weather was fine and clear, and the tide was nearly high water with a force of about two knots. The trawler was proceeding up the Humber, keeping, as the plaintiffs alleged, on the starboard side of the channel between Bull buoy and Clee Ness buoy on a N.W. magnetic course, and making about eight knots, when those in charge of her observed, about one and a half miles distant, and about two points on the port bow, the masthead and green lights of a vessel which proved to be the *Ashton*, an iron screw steam vessel of 1031 tons gross register, and a crew of twenty-two hands, from Grimsby to Hamburg with cargo and passengers. Almost immediately afterwards the red light of the *Ashton* also came into view. The helm of the *King Stephen* was ported to allow the *Ashton* plenty of room to round Clee Ness, and one short blast was sounded on her steam whistle, the helm being afterwards steadied. The red light of the *Ashton* was then shut in, but, after a short interval, it was again opened, whereupon the helm of the *King Stephen* was ported a little more, one short blast being again sounded on her whistle, and the helm was then steadied; the *Ashton*, however, again shutting in her red light, came on at a high rate of speed, and although, when those on board the *King Stephen* saw that a collision was inevitable, their engines were stopped and reversed full speed astern and the helm put hard-a-port, a collision occurred, the port side of the stem of the *King Stephen* striking the starboard side of the *Ashton* in the way of the fore-gangway.

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(1) Regulations for Preventing Collisions at Sea, 1897 :—

Art. 19 : "When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other."

Art. 21 : "Where by any of these rules one of two vessels is to keep out of the way, the other shall keep her course and speed . . . ."

Art. 22 : "Every vessel which is directed by these rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other."

Art. 23 : "Every steam vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse."

Art. 25 : "In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fair-way or mid-channel which lies on the starboard side of such vessel."

The defendants, the owners of the *Ashton*, alleged that their steam vessel was proceeding down the Humber from Grimsby, and at the material time was a little above the Clee Ness buoy, and below the Burcom buoy. She was making about ten knots over the ground, on a course S.E. b. E. ¾ E. magnetic, and heading to pass a clear berth from the Clee Ness buoy, when the masthead and red lights of the trawler *King Stephen* were seen four points on the starboard bow and distant one and a half to two miles. The helm of the *Ashton* was slightly starboarded and then steadied, and as the masthead and red lights of two steamers bound up the river on her port bow were in sight somewhat nearer than the *King Stephen*, no starboard helm signal was sounded on her whistle. The red light of the trawler broadened on the starboard bow and the vessels would have passed all clear without risk of collision, but, as she came nearer, the trawler was seen to be suddenly closing in under a port helm. As the engines of the *Ashton* could not be reversed without certainty of collision, they were at once stopped, the helm put hard-a-starboard, and two blasts blown on her whistle in answer to a short blast from the trawler, which vessel, however, came on at great speed under a hard-a-port helm, and the collision occurred, both vessels sustaining considerable damage.

The plaintiffs, owners of the *King Stephen*, charged the defendants, owners of the *Ashton*, with breaches of arts. 19, 22, 23, 25 (set out above), 28 (sound signals by vessels in sight of one another), 29 (precaution required by ordinary practice of seamen) of the Regulations for Preventing Collisions at Sea; whilst the defendants charged the plaintiffs with breaches of arts. 21 (set out above) and 28, or, alternatively, with breaches of arts. 23, 25, 28, and 29 of the same regulations.

Aspinall, K.C., and *Balloch*, for plaintiffs, owners of the *King Stephen*. Whether the waterway between the Bull and Clee Ness buoys on the one side, and the buoys on the northern side, is a narrow channel or not, the *King Stephen* was being navigated so as to keep to the northward, and give the *Ashton* plenty of room to pass round between her and the Clee Ness buoy. No charge can, therefore, be established against the *King Stephen* on the ground that she failed to comply with art. 25, by not keeping to that side of the fairway or mid-channel which lay on her starboard side, and, assuming that art. 25 does apply, the crossing rule, art. 19, may also apply: see *The Leverington* (1); and under that rule the *Ashton* was bound to keep out of the way of the *King Stephen*, which she failed to do, and, by improperly starboarding, brought about the collision. It is true that if art. 19 applies to the *Ashton*, then the *King Stephen* was bound under art. 21 to keep her course and speed; but the porting of the *King Stephen* was for the purpose of giving the *Ashton* more room, and also to follow the direction of the channel.

Robson, K.C., and *Lauriston Batten*, for defendants, owners of the *Ashton*. If the narrow channel rule applies, then the *King Stephen* was on her wrong side, for the weight of the evidence tends to prove that that vessel was much more to the southward, and much nearer the Clee Ness buoy, than the plaintiffs are willing to admit; but, whether that rule governs this case or not, the master of the *Ashton* relied upon the *King Stephen* obeying the "crossing" rule and, by keeping her course and speed, enabling the *Ashton* to get out of her way. The attempt on the part of the *Ashton* to avoid the *King Stephen* was defeated by the persistent porting of the trawler, and for that the *King Stephen* is to blame. It is true that, under art. 22, the vessel which is to keep out of the way should avoid crossing ahead of the other; but that rule only applies if there is risk of collision under art. 19, and art. 22 only then applies "if the circumstances of the case admit," and, in this case, the *King Stephen* being as much as four points on the starboard bow and broadening, art. 19 did not

(1) (1886) 11 P. D. 117.

apply, there being no risk of collision, and considering the dangerous vicinity of the Clee Ness buoy the *Ashton* could not be called upon to port and go under the stern of the *King Stephen* or to stop sooner than she did, for she could have safely passed ahead, if the *King Stephen* had not improperly gone on porting and hard-a-porting until she was heading to the eastward of north.

Aspinall, K.C., in reply. The more the *King Stephen* ported, the greater the facility afforded to the *Ashton* to herself port and pass out round the Clee Ness buoy.

GORELL BARNES J. In this case a collision took place between the *King Stephen* and the *Ashton* in the river Humber at about one o'clock in the morning on May 11 last. According to the preliminary acts the collision is put by the plaintiffs as occurring "in the vicinity of Clee Ness buoy," and by the defendants as occurring "a little above Clee Ness buoy." The actual angle of the blow is not substantially in dispute. Drawings have been put in which shew it. The *Ashton*, with the starboard side some distance from the stem, came against the port side of the stem of the *King Stephen*.

The plaintiffs' case is that the *King Stephen* was coming in from the North Sea fishing grounds to Grimsby, and was coming up on the starboard side of the channel, between the Bull buoy and the Clee Ness buoy, heading N.W. and making about eight knots; that the masthead and green lights of the *Ashton* were seen at first, at a distance of a mile and a half or thereabouts, two points on the port bow of the *King Stephen*; that afterwards the red light of the *Ashton* came into view, and thereupon the helm of the *King Stephen* was ported, one short blast given on her whistle, and the helm steadied; that the red light of the *Ashton* was shut in and again opened, and the helm of the *King Stephen* was ported a little more and one blast again sounded and the helm steadied; but that then the *Ashton* came on at a high speed, again shutting in her red light, and the engines of the *King Stephen* were then stopped and reversed and her helm put hard-a-port. The effect of that case is to suggest that the vessels were in such a position that the *King Stephen*, seeing the red light of the *Ashton*, ported and kept away, allowing more room, but that the *Ashton* produced the collision by starboarding and not keeping out of the way of the *King Stephen*. On the other hand, the defendants' case is absolutely inconsistent with that told by the plaintiffs. They say that the *Ashton*, bound from Grimsby to Hamburg with cargo and passengers, was making a course of S.E. by E. ¾ E. at a speed of ten knots over the ground—allowing for the flood tide it would be about eleven and a half knots—that those in charge of the *Ashton* saw the masthead and red lights of the trawler four points on the starboard bow and distant from one and a half to two miles; that they slightly starboarded the helm, and then steadied it, but did not sound their whistle because there were some steamers on the port bow which might have been hampered by the starboard helm signal; that the red light of the trawler broadened on the starboard bow, and the vessels would have passed all clear without risk of collision, but as the trawler came nearer she was observed to be closing in under a port helm. The defendants then say that the *Ashton's* engines could not be reversed without certainty of collision, but that they were at once stopped and the helm put hard-a-starboard, two blasts being blown on her whistle, and they say that the collision was brought about by the other vessel porting and hard-a-porting. The great inconsistency between the two cases is that upon the defendants' case those on the plaintiffs' vessel never could have seen the red light of the *Ashton*.

Now, the case involves the consideration of certain of the rules applicable to the navigation in this locality. Amongst them are the starboard hand, or narrow channel, rule, and the crossing rule. The plaintiffs contend that they were not in a position in which they could be held to be wrong with regard to the side of the channel on which they were navigating, and that in a sense there is no channel. The defendants contend that the plaintiffs were in a wrong position as regards the channel, and that they are to blame in that respect. The navigation of this place is perfectly clear from the chart. The river runs from Hull downwards past the middle red light, out to the Bull, and the port of Grimsby lies, coming down, on the starboard hand, so that any vessels coming out of Grimsby have to get into the main stream by passing out first near the Spar buoy and then by the No. 4, or Burcom, buoy, and then have to come round under port helm near the Clee Ness buoy, and so get straight down to the Bull. There seems no doubt whatever, to my mind, that the ordinary course of navigation would be what I have just indicated, and that the traffic treats the part of the river opposite Clee Ness buoy as a narrow channel, in which vessels pass close to the Clee Ness buoy going down, and other vessels coming up ought to give the Clee Ness buoy a wide berth and keep well to the northward of it. My impression is that the narrow channel rule does apply to the place where this collision happened, and that vessels which come out properly should round the Clee Ness buoy, and that vessels going in should keep well over away from the Clee Ness buoy, so as to allow the outward traffic to pass between them and the Clee Ness buoy.

I do not think, however, it makes any practical difference whether the strict terms of the narrow channel rule are treated as applying or not, because it is quite obvious that any vessel coming out from Grimsby must come as the defendants' vessel came, practically down on the line of the sector from the Spurn Light, and quite close round the Clee Ness buoy, and that any vessels coming up must make an allowance for that position, that is to say, the incoming ship would have to allow the downcoming vessel room to pass there; and so to my mind it does not make much difference whether you do or do not treat the rule as strictly applying.

The first point to determine is the spot where the collision took place. The plaintiffs contend that it was at some distance, a quarter of a mile, from the buoy, and the defendants that it was two or three lengths from it. My impression, after having heard the whole of the evidence, and especially the conversation between the two masters, I think it was, is that the collision took place very close to Clee Ness buoy, in such a position that the downcoming vessel was jammed up close to the buoy—that in fact there was no room left for that vessel to go down without difficulty. I think that must be so, whichever case you take, because when the plaintiffs speak of the vessel coming out on a two point bearing on their port bow it puts the defendants' vessel in a position in which she would be coming from Grimsby as she says she was, namely, along the line of lights. Therefore, if this matter had depended upon that point alone, I should have thought that the plaintiffs' vessel was wrong in being in the position in which she was, and that quite apart from any difference as to the bearing on which the defendants first saw the plaintiffs' vessel. My impression upon that is that the plaintiffs' vessel must have been very close to the line of that buoy, and that there is some justification for what the defendants are contending; but I cannot quite accept their view of the breadth of the bearing on which they say the plaintiffs' vessel was when they made her out. I think that is not quite correct, and that there is some exaggeration on the defendants' part in relation to it.

The next matter to consider is whether the crossing rule comes into force in this locality. The impression which I have formed is that it does. The traffic going up and down the river has to go past, in this locality, the traffic coming out of Grimsby, which has, speaking in general terms, to go across it to get into position; and, therefore, vessels at certain times and places seem to me necessarily to be in the position of crossing vessels. The plaintiffs, in order to get rid of that difficulty, suggested that they kept seeing touches of the red light of the defendants' ship, and therefore ported. On the other hand, the defendants say their position was such that the red light could never have been seen, and that is the view I accept. It seems to me that with a vessel coming out of Grimsby in the natural course of things—and that natural course of things is supported by the evidence of the defendants that they were coming down with the Spurn Light slightly on their starboard bow, along the line of the sector shewn on the chart—it is almost impossible for the plaintiffs ever to have seen the red light of the defendants' ship. Of course it is possible if the defendants' ship was finding her way through different craft—she might then have altered so much as to shew her red light; but that was not really suggested, and my view is that the plaintiffs never were in position to see that red light, and wrongly ported from first to last. If the crossing rule applies, it is quite clear that the *King Stephen* had no business to port at all. She had to keep her course and speed; but even if the rule does not apply, it does not seem to make any practical difference, because the position is that of one vessel approaching with her green light shewing and another coming up with her red light shewing, and that position would exist for a considerable time. That is a position of danger ahead which, when you consider the angle of the blow to which I have referred, shews that the plaintiffs' vessel was running into danger, and ported to such an extent as really to create that danger in a violent way at the finish, and kept on without reversing her engines until the very last moment. The engineer of the plaintiffs' vessel said that the vessel's engines were going astern ten or twelve revolutions, and that the ordinary number of revolutions at full speed was eighty per minute. Therefore the engines must have been reversed at the very last moment, and my view is that the great alteration which produced this blow, leading forward, according to the drawing, was produced by the plaintiffs' action, and that the alteration by the defendants was much slighter. The plaintiffs were, therefore, not only running into danger from the first, but bringing about that danger more effectively at the last, and doing nothing to counteract it by stopping and reversing the engines. Whatever view is taken of the rules, I think the plaintiffs' vessel must be held to blame.

The question remains whether the defendants' vessel is also to blame. I think there are two grounds for so holding. The first of those is on the assumption that the crossing rule applies, which I think it does. With regard to that, as I have already said, I am not quite prepared to accept the defendants' case that the *King Stephen* was so very broad upon the bow as the witnesses from the *Ashton* seek to make out. The crossing rules which affect the defendants are the 19th and the 22nd. [The learned judge read these two rules, already set out, and continued:—]

The only way in which, with reference to rule 19, the defendants can escape from liability, on the position of the vessels, is by shewing that they were crossing so as not to involve risk of collision. If they could make that out then, as rule 19 would not apply, rule 22 would also not apply. That appears to have been the ground on which the defendants based their case, because the master of the defendants' vessel—who, I think I ought to say, was navigating, speaking generally, with care, and gave his evidence very well—stated this: "I saw the red and the masthead lights, bearing about four points on the starboard bow, a mile and a half off. I thought she was inside the buoys, out of the channel, and I starboarded, as a matter of precaution, and then kept my course." If it was a sound view to take that there was no risk of collision in the position in which the vessels were, then why starboard as an act of precaution? That shews that in acting as he did, taking the position of the other vessel to be as broad as he said it was, which I doubt, he was acting as a matter of precaution, and therefore was considering, on his own action, that there was a risk. Then he described why, on starboarding, he did not whistle, and then he said, "I took a second bearing, and she had broadened a point." That only means, in reality, that she had broadened half a point, because half a point had been produced by the starboarding of the defendants' ship. He then said: "I kept on on my course, and the mate reported that the vessel was porting. I watched and found she had done so, and I stopped the engines."

The question I have to consider is whether it can be said that at the outset there was no risk of collision, so as to make the rule not applicable. The ground upon which the defendants put it must be that, having regard to their speed and the other vessel approaching them at a slower speed on the starboard side, there really was no risk of collision. I have carefully considered this matter with the Elder Brethren who are assisting me, and, taking into account the fact that, although it is said the lights of the *King Stephen* broadened, they broadened very slightly, the Elder Brethren cannot, nor can I, accept the view that there was no risk of collision. Action had been taken as a precaution against the very risk which ultimately turned out to be a real risk, and in those circumstances it seems to me that it cannot be said that the rules as to keeping out of the way and not crossing ahead of the other ship are not applicable. The defendants, it seems to me, were within those rules, and their vessel ought not to have attempted to cross ahead of the other ship. If there were any difficulty, with regard to the buoys, in porting at that time, then the difficulty could have been avoided either by stopping the engines and waiting until the red light had crossed their bows, or by running away under hard-a-starboard helm, although that is probably not nearly so advisable a course as stopping and waiting. In fact, that very point is referred to in the notes to art. 22 in Mr. Stuart Moore's collection of Rules of the Road, where he says: "By this rule a steam vessel should port to a red light on her starboard bow. She may, however, stop without porting and wait till the other vessel has passed." (1) Then there is this further point upon which the Elder Brethren also advise me, and that is, supposing the rules do not apply, if it can be said that, for any reason that would bear investigation, the crossing rule is not to apply, then you have still two vessels approaching, one shewing a green light and the other shewing a red light, and at a certain period risk is created by the plaintiffs' vessel porting her helm and running up to the northward and N.E. under that port helm. The master of the defendants' vessel said substantially that he stopped his engines and put his helm hard-a-starboard, blowing two blasts, when the other ship was about a length off, and that he did not reverse as it would have canted the defendants' steamer towards the other vessel. Now, if you assume, as I have done, that the most alteration was by the plaintiffs' vessel, that alteration was a very large one. It was an alteration the execution of which, even taking into consideration the smallness of the vessel which effected it, would require time; and the moment it was seen that this other vessel was not going on broadening, and was porting, the engines of the defendants' vessel, in the opinion of the Elder Brethren, should have been stopped and reversed. That, I think, is in accordance with sound sense and judgment, because

(1) The Rules of the Road at Sea, by H. Stuart Moore, 3rd ed. (1900), p. 52.

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THE ASHTON.

Gorell Barnes J.

then this collision could not have happened. The other vessel would have ported right across the defendants' vessel. The result, in my judgment, must be that, although I cannot help thinking the main blame rests with the trawler, both ships must be held to blame for the collision.

Solicitors for plaintiffs, owners of the *King Stephen*: *Deacon, Gibson, Medcalf & Marriott, for Grange & Wintringham, Great Grimsby.*

Solicitors for defendants, owners of the *Ashton*: *William A. Crump & Son, for A. M. Jackson & Co., Hull.*

T. L. M.

1904
Dec. 15, 16.

THE SKIPSEA.

Admiralty—Collision—Vessels crossing River—Tyne By-laws, 1884, *arts.* 21, 22.

The meaning of arts. 21 and 22 of the Tyne By-laws—by which a vessel "requiring to pass over a part of the channel which is not within that half reserved for its navigation," and when "crossing the river . . . . shall be navigated so as not to cause obstruction, injury, or damage to any other vessel"—is that those in charge of a crossing vessel on seeing that there is time and opportunity to cross without causing obstruction may do so, and any other vessel must act reasonably in respect of the crossing vessel, so that, if a little more room is required to assist the crossing vessel, that room must be given. The vessel crossing takes, however, upon herself, at the outset, the responsibility of being able to do so safely with reference to the passing traffic—that is, those in charge of her are put to their election whether they will cross and call upon a passing vessel to take the ordinary precautions to avoid collision, or whether they will stop where they are and allow that other vessel to pass, in either case not hampering or misleading the other vessel, but clearly and unmistakably indicating to that other vessel the course which they intend to pursue.

ACTION of damage by collision.

The plaintiffs were William Cory & Son, Limited, of London, owners of the *Vernon*. The defendants, and counter-claimants, were William Brown Atkinson & Co., Limited, of Hull, owners of the *Skipsea*.

The case is reported on the question of the extent of the duty in respect of careful navigation cast by the Tyne By-laws (1) upon a vessel crossing that river.

On September 14, 1904, about 5.45 P.M., the wind being easterly light, the weather fine and clear, and the tide last quarter flood of the force of about a knot, the screw steam vessel *Vernon*—belonging to Newcastle-on-Tyne, of 982 tons gross register, engines of 110 horse power nominal, and a crew of sixteen hands, from the Tyne to Rochester with a cargo of coals—having sounded a long blast on her steam whistle before coming out of the Northumberland Dock, was just outside the lock, and inside the line of the northern bank of the river below the entrance. Those in charge of her were intending to cross on to the south side of the river in order to proceed down if the way should prove to be clear, and for that purpose the vessel, with the helm a little to starboard, was heading in a direction towards the south shore and down river, and

(1) The Tyne Improvement Commissioners' By-laws, allowed November 15, 1884:—

Art. 19: "Every vessel under way shall when proceeding seaward be kept to the south of mid-channel, and when proceeding inward from sea or up the river to the north of mid-channel, and so that in either case such vessel shall, with a port helm, always be and be kept clear of any vessel proceeding in the opposite direction."

Art. 21: "Every vessel when under way, and requiring to pass over a part of the channel which is not within that half reserved for its navigation, for the purpose of proceeding to or from any landing, mooring, or other place, shall be navigated so as to cause no obstruction, injury, or damage to any other vessel; and every vessel continuing its navigation, after reaching such landing, mooring, or other place, shall be navigated as soon as practicable to the side of the river specified as the proper side for its navigation, and so as to cause no obstruction, injury, or damage to any other vessel."

Art. 22: "Every vessel crossing the river, and every vessel turning, shall be navigated so as not to cause obstruction, injury, or damage to any other vessel."

Art. 23: "When steam vessels proceeding in opposite directions are approaching each other they shall be kept on their proper sides, and if necessary speed shall be slackened, the vessel going against the tide in all cases giving way to the one going with the tide, and when steam vessels are approaching each other so as to involve risk of collision, their helms shall be put to port, and if necessary their engines shall be stopped or reversed."

Art. 26: "Every sea-going steam vessel, when under way in the port, shall be so navigated as not to involve risk of collision . . . ."

Art. 38: "Every vessel shall be navigated in a careful manner, especially in those parts of the river where there is much traffic."

making about one and a half knots through the water with engines working slow ahead, when a vessel—which proved to be the steel screw steamship *Skipsea*, of 2993 tons gross register, engines of 300 horse power nominal, and a crew of twenty-four hands, from Rotterdam to Dunston-on-Tyne, in water ballast—was observed coming up the river with a tug made fast ahead, distant between 300 and 400 yards, and bearing about three points on the port bow. In order to keep out of the way of the *Skipsea*, and allow that vessel with her tug to continue their course up the river, the helm of the *Vernon* was put hard-a-starboard, two short blasts sounded on her whistle, and shortly afterwards her engines were stopped; but the plaintiffs alleged that those in charge of the *Skipsea*, instead of continuing their course up the river and passing outside the *Vernon*, sounded one short blast on the steam whistle, and the course of the vessel and her tug was altered as if under port helm. The helm of the *Vernon* was immediately put hard-a-port and her engines full speed astern, three short blasts being sounded on her whistle. The *Skipsea*, however, came on at considerable speed, continuing to alter as if under port helm, and so towards the *Vernon*, which was keeping inside the line of the buoys of No. 3 tier, and the *Vernon* with her stem and port bow came in contact with the port bow of the *Skipsea* a little abaft the collision bulkhead, both vessels sustaining damage.

The defendants alleged that, at the material time, the *Skipsea*, in charge of a duly licensed Tyne pilot, and with the tug *Rainbow* fast ahead, was proceeding up the river on the north side of the channel between the Albert Edward and Northumberland Docks, with her engines stopped and making about one and a half knots through the water. Her whistle had been sounded a long warning blast as she approached the Commissioners' Staiths, and then the *Vernon* was observed about a quarter of a mile distant, bearing about half a point on the starboard bow and heading across the river, having come out of the Northumberland Dock. The helm of the *Skipsea* was ported a little, steadied, her whistle sounded one short blast, and that signal repeated, whilst the *Vernon*, sounding two short blasts in answer to each of those signals, gradually drew across the bows of the *Skipsea* and on to the port bow. The *Vernon* was then seen to be canting under a starboard helm towards the *Skipsea* causing danger of collision, whereupon the engines of the *Skipsea* were put full speed astern, and her whistle sounded three short blasts, which signal was repeated; but the *Vernon*, sounding two short blasts in answer to each of the signals of the *Skipsea*, continued to swing under a starboard helm, and came into contact with the *Skipsea*, although that vessel just before the collision let go her starboard anchor and the tug slipped her tow-rope.

The plaintiffs charged the defendants with failure to comply with arts. 26 and 38 of the Tyne By-laws (set out above), whilst the defendants, in addition to breaches of those two articles, charged the plaintiffs with failure to comply with arts. 19, 21, 22, and 23 of the same by-laws (set out above).

Dec. 15. *Laing, K.C.*, and *Balloch*, for plaintiffs, owners of the *Vernon*. The *Skipsea* and her tug should have kept their course up the river, and then there would have been no collision, for the *Vernon*, in order to obey art. 22 of the Tyne By-laws, and not cause an obstruction to the passing traffic by attempting to cross the river at that time, was waiting for the *Skipsea* and her tug to go by. In obedience to art. 23, which requires the vessel going against the tide to give way, the *Vernon* was almost stationary, with just sufficient way upon her and enough helm action to counteract the effect of the last of the flood upon her port bow. Instead, however, of keeping on, those in charge of the *Skipsea* by porting brought about a position of danger in breach of art. 26 of the same by-laws, by which they were required to navigate so as not to involve risk of collision.

Aspinall, K.C., and *D. Stephens*, for defendants, owners of the *Skipsea*. The evidence shews that those in charge of the *Skipsea* had been hailed by a passing steam vessel that another vessel was coming out of the Northumberland Dock. They were therefore on the alert, proceeding with caution under arts. 23 and 38 of the Tyne By-laws, and, when they saw that the

Vernon had headway on her, they acted under art. 19 with their port helm so as to allow the *Vernon* to pass across their bows and get over to the south side of the river. If the *Vernon* had proceeded as she should have done under art. 21, to cross over, there would have been no collision; but those in charge of her acted with indecision, and, instead of porting, starboarded, thereby bringing their vessel into her wrong water. It was the duty of the *Vernon* to have kept clear of the *Skipsea*, either by stopping where she was or by navigating to her proper side of the river as soon as practicable; but she in fact caused an obstruction involving risk of collision in breach of arts. 22 and 26, and, though those in charge of the *Skipsea* did their best to assist the *Vernon* to cross the river, the damage ensued owing to the *Vernon* not taking advantage of the opportunity to get across, or giving proper indications of a different intention.

Laing, K.C., in reply.

Cur. adv. vult.

Dec. 16. GORELL BARNES J., who was assisted by two of the Elder Brethren of the Trinity House, in giving judgment said:—This is the case of a collision which took place between the steamships *Vernon* and *Skipsea*, about 5.45 P.M. on September 14 last, speaking generally, off the Northumberland Dock entrance in the river Tyne. The *Vernon* was bound from the Tyne to Rochester with a cargo of coal, and was therefore proceeding out of the Northumberland Dock entrance with the object of going down the river. The *Skipsea* was inward bound from Rotterdam to Dunston-on-Tyne, which is above the Northumberland Dock, in water ballast, with a pilot in charge and a tug ahead of her. She was proceeding up the river. There is some dispute as to the exact spot at which the two vessels came into collision; but it must have been, I think, not very far from the upper buoy of what is marked on the chart before me as No. 3 tier, well over to the north side of the channel. The port bow of the *Skipsea* was struck, apparently, by the port bow and stem of the other vessel, and there was evidently a very fine angle between them.

Now, the rules which are applicable to this case are the Tyne By-laws, Nos. 21 and 22. Probably the 22nd is more applicable, but the 21st is of a somewhat similar character. [The learned judge read the two by-laws already set out, and continued :—] The words of rule 21 referring to that "part of the channel which is not within that half reserved for its" (the vessel's) "navigation" must be read with reference to rule 19 requiring a vessel proceeding inward and up the river to keep on the north side, and a vessel proceeding out to sea to go to the south side, so that each vessel shall pass the other on the port side. Some of the rules to which I have referred have been dealt with in earlier cases, one of which is *The Thetford* (1), and they substantially seem to me to indicate that the crossing vessel must be so navigated as not to cause obstruction to another vessel; in other words, that the crossing vessel may cross if there is time and opportunity to do so without hampering another vessel, and that another vessel which sees a vessel about to cross must act reasonably with regard to that crossing vessel, and if the crossing vessel requires a little more room to assist her in crossing such more room must be given. It is a kind of give and take, but I do not think I am going too far in saying that the weight of the operation at the outset is principally upon the vessel crossing, in this sense, that she must see whether she has room to cross, and, if she has room, she may cross.

This is one of those cases in which, to my mind, it is exceedingly difficult to arrive at any decision if one binds oneself down to particular answers given by particular witnesses, for there is a good deal of the evidence on both sides which one cannot possibly accept. The case on the part of the plaintiffs is that they were acting in such a way as to shew that they were proceeding to keep away to the northward of the upcoming ship, and that the upcoming ship really had no difficulty in passing to the southward. The case presented on the other side is that the upcoming ship had the other vessel in a position in which they at first thought she would cross, and that they acted accordingly; and some of the

(1) (1887) 6 Asp. M. L. C. 179.

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defendants' witnesses say that the other vessel did in fact get across them and then came swinging back towards them. That is a gross exaggeration. It is not likely that the *Vernon* would come back after she once got across. That is not the evidence given by the pilot, and those who have given it, I think, have been led away by the fact that the bows of their own vessel were swinging round under the reverse action of the engines.

I think this case may be decided upon what may be termed the undisputed facts. It is not disputed that the plaintiffs' vessel came out of the lock at an angle across the river, and was moving, according to the statement of claim and the preliminary act, at about a knot and a half through the water, with engines moving slow ahead. There is also very little doubt that the other vessel, which was coming up river, had received warning that a ship was coming out of dock, that she was proceeding at slow speed, and had reversed the engines slightly to take her way off still more, and that she was also coming up river under a proper mode of navigation. I think the discrepancy between the two sets of witnesses about her position in the channel can be reconciled by noticing that the buoys of No. 3 tier stand out very considerably into the river. When the plaintiffs say that the *Skipsea* was coming up in mid-channel, and the defendants say she was coming up well over to the north side, they are both not very far from speaking the truth, because a vessel which appears to those on a vessel coming out to be in mid-stream may still not be very far from the buoys on the north side, and be well within what is termed her own water. It seems to me that the probabilities go rather to shew that the up-coming ship was coming up in a proper position on her own side of the navigable water. The next matter that is not in much practical controversy, and may, I think, be accepted, is that the two vessels sighted each other at about 400 yards apart; that is to say, as soon as the *Vernon* was far enough forward from the gate of the basin to see past the corner wall, she could see the other vessel coming up, and, of course, the upcoming vessel could see her. I do not suppose that the large vessel, the *Buluwayo*, that we have heard of was any substantial obstruction. Having regard to her length and size, and to the place where she was loading, she would not, I think, obstruct the view from the two vessels of each other as soon as the one coming out was fairly clear of the basin entrance and could see round the corner of the point. Another matter which is not in any really substantial conflict is approximately the spot of the collision—that is to say, well to the north side, not very far from the upper buoy of No. 3 tier. I think it follows from that statement of the position of the collision that, having regard to the state of the tide and the distance at which these two vessels saw each other, both vessels must have moved very nearly the same distance through the water to the spot of the collision from the time they first saw each other; and the vessel coming up had the tide with her, and was moving in the stream of it. If it is measured off with care it will be found that the outcoming vessel must have moved a considerable distance from the edge of the basin to get to the spot of the collision.

What is the general conclusion to draw from these facts, which are independent of smaller details mentioned by witnesses, about which there is a great deal of discrepancy? Taking the general features, I think the real solution of the case turns on the question whether or not when those on the defendants' vessel first saw the *Vernon* they were justified in assuming that she was about to cross the river, and that they ought to take action to help her to do so by giving room, or whether they ought to have assumed that she was going to remain on the side where she was and did not mean to attempt to cross. The pilot of the defendants' vessel, who gave his evidence, I think, well, said this: "I knew from the pilot or some one on board another steamer that there was a steamer coming out of dock"; and, dealing with the manœuvres which he adopted, he said, "I gave orders to stop and to my tug to 'vast towing,' and I gave a long warning blast. We had then two knots speed through the water and we reversed a few revolutions, knowing there was a ship coming out." Then he said, "I saw her 400 yards off, a little on the starboard bow, and we gave one short blast, and she replied with two. I thought she would

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cross and go into her water. I ported a little when I first saw the *Vernon*, steadied again, and blew one blast again, and she replied again with two. I saw she was acting under starboard helm, and I reversed and gave three short blasts." I think the effect of that is that he had committed himself, as soon as he saw this ship coming out, to the idea that she was crossing, and that he acted so as to keep to the northward and allow her to cross.

Now were those on board the defendants' vessel justified in that assumption, and what grounds had they for so acting? It is clear that the *Vernon* was proceeding out of the dock entrance with engines working slow ahead and making a knot and a half, or thereabouts; and when the other vessel saw her, and when those on board the *Vernon* could see the other vessel, the plaintiffs contend that the *Vernon* kept in such a position and acted in such a way that the defendants' vessel ought to have kept away to the southward of her. The defendants, on the other hand, say that the action of the plaintiffs' ship was such as to indicate in the first instance that she was crossing the river, and that they, the defendants, acted at first as if that was the intention of the plaintiffs' ship. That the vessels were very close together, and that the opportunity for the plaintiffs' ship to cross the river was not a good one, is tolerably clear. Possibly she might have got across if she had acted at once, but still I think that the more prudent action to take was that which was partially taken by the plaintiffs, namely, not to attempt to cross after they had seen the vessel in front of them, approaching at such a short distance; but I do not believe the plaintiffs' witnesses when they say that the defendants' ship was by the action of her port helm brought as much across river as they say, or that the tug was towing on the starboard bow. If that had been so, the tug would have found herself in difficulties with the *Buluwayo*. On the other hand, I do not accept the view of the defendants that the plaintiffs' ship got right across the bows of the *Skipsea*, and then came back again. The plaintiffs' vessel had, to use an expression of her master, just got her stern nicely clear of the lock gates, and at first sight, it seems to me, those on the defendants'

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vessel would say, "That ship is coming out of dock and is moving ahead." If that was the impression to be conveyed, what ought the plaintiffs to do in connection with such a position? It seems to me that they are then put upon their election, either to cross the river, or to stop where they are and keep such a position as not to hamper or mislead the defendants; and I think that those on the plaintiffs' vessel ought in such a position to have indicated unmistakably to the defendants what their action was to be—that is to say, if they were intending to cross, which might be risky in the circumstances, to act at once to do so, but if, on the other hand, it was not right to cross, and they determined to stop where they were, to indicate that in an unmistakable way. As counsel for the defendants pointed out, if the ship in the dock entrance was stationary, then the upcoming ship could say, "I can go on and pass her"; but if she was not stationary, having regard to this narrow way, then she should have indicated what she was going to do. The proper way to do it was to have given three short blasts at once and reversed her engines, and kept in the lock or near the lock entrance. If it is said that might have tended with the tide to cant her head to starboard, it is not really of moment, because it could only have been for a short time, and it could have been counteracted by dropping the anchor while the other ship passed. The *Vernon* neither went across, nor did she indicate with any definiteness what she was going to do. I think the defendants first blew a short blast, and then the *Vernon* blew two; but that would be indicating only that she was trying to keep to the northward, and that is a matter which, I think, would be contrary to the general spirit of the rules. It seems to me that that failure to indicate distinctly that she was going to stop where she was and not cross the river is really the cause of this trouble, because it leaves the upcoming ship, which was being navigated carefully and properly, and on which it is extremely difficult to find any real negligence or defect of management, in the position of thinking, "Well, I am not sure whether this ship means to stop or to cross, and I think from her motion ahead she is going to cross, and she is not

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indicating properly that she is not going to do so." Then the defendants' vessel ports slightly and reverses her engines for a time—there is some discrepancy between her pilot and engineer about it—possibly the engines were stopped at the end because it was found that the vessel was canting so much to the northward that there was danger of her getting into difficulties with the buoys or with the *Buluwayo*—and I do not think she could do anything else. The result, to my mind, is that the plaintiffs' vessel, the *Vernon*, is alone to blame.

Solicitor for plaintiffs, owners of the *Vernon*: *Charles E. Harvey.*

Solicitors for defendants, owners of the *Skipsea*: *Botterell & Roche.*

T. L. M.

1904
Dec. 16.

DIXON *v.* THE SOLICITOR TO THE TREASURY.

Probate—Dependent Relative Revocation—Unfulfilled Intention to execute fresh Will.

The doctrine of dependent relative revocation may apply to a case where the document intended to be substituted for that which was destroyed is non-existent and has never existed as a valid testamentary paper. (So *held* by Gorell Barnes J.)

Upon a finding of fact that the testator destroyed his will with the intention that it should be revoked conditionally on his executing a fresh will:—

Held (by Gorell Barnes J.), that, as he did not execute a fresh will, the will destroyed was entitled to probate.

PROBATE ACTION.

The plaintiff, as sole executor, propounded a will dated July 7, 1894, of James Alexander Shaw, who died on February 8, 1904.

The deceased had no known relatives, and the Crown, as interested in the event of an intestacy, was made defendant in the action, and pleaded that the deceased mutilated his said will by cutting off therefrom, with a pair of scissors, his signature, and by erasing parts of the document with the intention of revoking the same; that the will was thereby revoked; and that the deceased died intestate.

The plaintiff, in reply, denied that the acts alleged in the statement of defence were done (if at all) with the intention to revoke the will; and, further, that the acts of revocation (if any) were accompanied with an intention, on the part of the deceased, to execute a new will, and were conditional on such new will being executed.

It appeared from the evidence adduced at the trial, which was held before Gorell Barnes J. and a special jury, that the deceased a few days before his death gave instructions to a solicitor for a new will, and, after sending for the will of 1894, there and then cut off his signature, and he stated, in answer to a remonstrance by the solicitor, that he meant to cancel the will as he was going to make a new one. The deceased further was alleged to have expressed himself to the effect that he understood that the cutting out of a signature from an old will was a necessary preliminary to making a new will. After he had thus mutilated the will, the deceased made a statement to the effect that his sole reason for desiring to make a new will was his desire to increase a certain legacy. The instructions then given to the solicitor covered, not merely the increase of that legacy, but other alterations. The solicitor used the mutilated document for embodying the deceased's instructions, and on the following day went through it with the deceased, who desired that a draft will should be prepared. This was accordingly done, but the deceased died without having executed it.

The instructions given by the deceased to the solicitor only covered a portion of the estate which the deceased had to dispose of.

Rawlinson, K.C., and *Barnard*, for the plaintiff. The cancellation was conditional on the execution of a new will. The facts disclose a case of dependent relative revocation. The condition not having been fulfilled, and there having been no absolute intention to revoke, the will stands and is entitled to probate.

[They referred to *In the Goods of De Bode* (1), *In the Goods of Eeles* (2), *In the Goods of Appelbee* (3), *In the Goods of Cockayne* (4), and *Onions* v. *Tyrer*. (5)]

Robertson, for the defendant. The doctrine of dependent relative revocation can only apply where the document to be revived is or has been actually in existence before the moment of the act of physical destruction. In other words, there must then be some document which the testator intends to revive: *Onions* v. *Tyrer*. (5) The doctrine of dependent relative revocation cannot extend to the case of an intention to execute a fresh document, and the one or two reported expressions to the contrary were only given in ex parte cases: *In the Goods of Appelbee* (3); *In the Goods of Cockayne*. (4) In the case of *In the Goods of Mitcheson* (6), which was contested, and where the facts were similar to those in the present instance, Sir C. Cresswell alluded to the decision in *In the Goods of Appelbee* (3), but decided the other way.

[GORELL BARNES J. *In the Goods of Appelbee* (3) was before the Wills Act, 1837 (1 Vict. c. 26).]

Powell v. *Powell* (7) was a case of unfulfilled intention to revive a previously executed document. [He also referred to *In the Goods of Weston* (8) and *Thynne* v. *Stanhope*. (9)]

In the present instance no complete instructions even were, in fact, given for a fresh will.

The doctrine of dependent relative revocation cannot arise here, and there is no case to go to the jury.

[GORELL BARNES J. The point seems to be: What interval of time (if any) between the act of physical destruction and the intention to execute a fresh testamentary document will debar the testator from having the benefit of the doctrine of dependent relative revocation?]

Rawlinson, K.C., in reply. No such point arises in this case. The physical act of destruction and the formation of intention to execute a fresh will were simultaneous and were part of one and the same transaction.

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(1) (1847) 5 N. of C. 189.

(2) (1862) 2 Sw. & Tr. 600.

(3) (1828) 1 Hagg. Ecc. 143.

(4) (1856) Dea. & Sw. 177.

(5) (1716) 2 Vern. 741; 1 P. Wms. 342.

(6) (1863) 32 L. J. (P. & M.) 202.

(7) (1866) L. R. 1 P. & M. 209.

(8) (1869) L. R. 1 P. & M. 633.

(9) (1822) 1 Add. 52.

GORELL BARNES J., having decided to leave the question to the jury, summed up as follows:—For the purposes of to-day I have decided to leave the question of fact to you. The plaintiff, being the executor, propounds this will of 1894 and proves its due execution. It was a perfectly good will down to the time when the question as to whether it was cancelled or not arose. It arises out of the events of the 6th, 7th, and 8th February, and upon that the Crown says the will was duly revoked by virtue of the 20th section of the Wills Act, 1837 (1 Vict. c. 26), which, so far as it applies to the present facts, is as follows: ". . . . No will or codicil, or any part thereof, shall be revoked otherwise than . . . . by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same."

The plaintiff, on the other hand, says that the destruction was not effected with the intention of revoking the will, but with the intention of getting rid of it and putting another will in its place. Looking at the will and at the instructions given on February 7 for a fresh will, I do not think it is correct to say that the testator's sole object was to deal with the legacy to one particular lady. It is obvious that the testator intended to make a new will, and did not intend that the Crown should take his property. He sent for his solicitor to take his instructions for a new will. The testator there and then cut out his own signature with a pair of scissors. It was just one of those stupid acts without which this Court might almost cease to exist. There is no doubt that the testator did what he did because he was making a new will. There is a point in this case which seems to differentiate it from those reported cases in which the judges were in doubt. If this testator cut out his signature because he thought that he had to cut it out before he could start operations on the fresh will, then he was doing that act as part of the operation of bringing a new will into force; and, if this were so, it follows that he would not have cut out his signature if he had thought that it would have the effect of making him die intestate. The questions I leave to you are—

(1.) Whether the testator cut his signature off the will with the intention of revoking the will; or—

(2.) Whether the testator cut his signature off the will with the intention that the will should be revoked conditionally on his executing a fresh will.

The jury answered the first question in the negative, and the second question in the affirmative.

Robertson asked for judgment for the Crown on that finding. The principle as to destruction of a testamentary document under a mistaken impression of law or fact has never yet been applied in a case where the document intended to be substituted was non-existent and had never existed as a valid testamentary document.

GORELL BARNES J. I pronounce for the will. The costs must of course come out of the estate. The litigation has arisen through the testator's own fault.

Solicitors for plaintiff: *Willis & Willis.*
For the Crown: *The Treasury Solicitor.*

H. D. G.

[IN THE COURT OF APPEAL.]

C. A.
1904
Nov. 21.

THE JAMES WESTOLL.

Admiralty—Collision—Practice—Action in Personam—Foreign Plaintiffs—Counter-claim—Security for Damages—Admiralty Court Act, 1861 (24 *&* 25 *Vict. c.* 10), *s.* 34—*Judicature Act*, 1873 (36 *&* 37 *Vict. c.* 66), *s.* 24, *sub-ss.* 5, 7.

The foreign owners of a tug, sunk in collision in the English Channel with a British vessel, brought an admiralty action in personam against the owners of the British vessel, who appeared, counter-claimed, and applied that all proceedings in the action might be ordered to be stayed until the foreign plaintiffs gave security for damages under the counter-claim :—

Held, by the Court of Appeal (Collins M.R. and Stirling L.J.), affirming the decision of Gorell Barnes J., that there was no jurisdiction to make the order; either under the special powers conferred on the Admiralty Court by s. 34 of the Admiralty Court Act, 1861, or under the general powers of the Courts of Law and Equity kept alive, and conferred on the High Court and the Court of Appeal, by sub-ss. 5, 7 of s. 24 of the Judicature Act, 1873.

INTERLOCUTORY APPEAL by defendants, owners of the *James Westoll*, in an action of damage by collision, against a decision in chambers of Gorell Barnes J., refusing to order the plaintiffs, owners of the *Hollander*, to give security to answer a counter-claim.

The case raised the question whether, assuming that there was no jurisdiction under the Admiralty Court Act, 1861, s. 34 (1), the order could be made under the Judicature Act, 1873, s. 24, sub-ss. 5, 7. (1)

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(1) 24 & 25 Vict. c. 10, s. 34: "The High Court of Admiralty may, on the application of the defendant in any cause of damage, and on his instituting a cross cause for the damage sustained by him in respect of the same collision, direct that the principal cause and the cross cause be heard at the same time and upon the same evidence; and if, in the principal cause, the ship of the defendant has been arrested, or security given by him to answer judgment, and in the cross cause the ship of the plaintiff cannot be arrested, and security has not been given to answer judgment therein, the Court may, if it think fit, suspend the proceedings in the principal cause until security has been given to answer judgment in the cross cause."

The facts were shortly as follows:—

On August 17, 1904, a collision occurred in the English Channel between the Dutch steam-tug *Hollander* and the British steamship *James Westoll*, which resulted in the sinking of the Dutch tug; and on August 25 the plaintiffs, who carry on business at Rotterdam, in the kingdom of Holland, as owners of the *Hollander*, issued a writ in an admiralty action in personam, against the defendants, James Westoll and others (naming them), owners of the *James Westoll*, claiming compensation for the damage occasioned by the *James Westoll* to the *Hollander*.

The owners of the *James Westoll* appeared as defendants, counter-claimed in respect of the damage sustained by their vessel through the collision, and, on September 6, issued a summons "to shew cause why all further proceedings should not be stayed until the plaintiffs gave security for the defendants' costs of the action, and also in respect of the defendants' counter-claim." The registrar dismissed that part of the summons relating to the counter-claim. The defendants appealed to the judge, and on October 31 Gorell Barnes J. confirmed the order of the registrar.

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(1) 36 & 37 Vict. c. 66, s. 24, sub-s. 5: "No cause or proceeding at any time pending in the High Court or before the Court of Appeal, shall be restrained by prohibition or injunction; but every matter of equity on which an injunction against the prosecution of any such cause or proceeding might have been obtained, if this Act had not passed, either unconditionally or on any terms or conditions, may be relied on by way of defence thereto: Provided always, that nothing in this Act contained shall disable either of the said Courts from directing a stay of proceedings in any cause or matter pending before it if it shall think fit; and any person, whether a party or not to any such cause or matter, who would have been entitled, if this Act had not passed, to apply to any Court to restrain the prosecution thereof, or who may be entitled to enforce, by attachment or otherwise, any judgment, decree, rule, or order, contrary to which all or any part of the proceedings in such cause or matter may have been taken, shall be at liberty to apply to the said Courts respectively, by motion in a summary way, for a stay of proceedings in such cause or matter, either generally, or so far as may be necessary for the purposes of justice; and the Court shall thereupon make such order as shall be just."

Sub-s. 7: "The High Court and the Court of Appeal respectively, in the exercise of the jurisdiction vested in them by this Act in every cause or matter pending before them respectively, shall have power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as to them shall seem just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in such cause or matter; so that, as far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided."

The defendants appealed.

Dawson Miller, for appellants (defendants), owners of the *James Westoll*. If the plaintiffs had commenced an action in rem, and arrested the *James Westoll*, or obtained bail from the defendants her owners, then, as the plaintiffs' tug *Hollander* was sunk, and, therefore, could not be arrested, the defendants, as counter-claimants, would have been entitled, under s. 34 of the Admiralty Court Act, 1861, to a stay of proceedings in the plaintiffs' action until security had been given to answer judgment in respect of the counter-claim; but the result of the plaintiffs' electing, not to sue in rem, but in personam, is that the plaintiffs have the personal security of the owners of the *James Westoll*, whilst the defendants, the owners of that vessel, have no security to answer their counter-claim, the tug *Hollander* being sunk and her owners foreigners.

Under these circumstances, assuming that the special provisions of s. 34 of the Admiralty Court Act, 1861, do not apply, it is submitted that where a foreign plaintiff invokes the jurisdiction by commencing an action here, there is a general power in the High Court and the Court of Appeal, under sub-ss. 5, 7 of s. 24 of the Judicature Act, 1873, to direct a stay of proceedings when there is a counter-claim in respect of which no security has been given; otherwise there would be a risk that no effect could be given to the judgment when obtained in respect of the counter-claim.

[*Adair Roche*, for the plaintiffs. There is power to make an English judgment executory in Holland.]

By Dutch law the liability of the shipowner is not limited to a statutory amount per ton, but the owner may free himself

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from all liability by abandoning his vessel, together with the freight earned on the voyage during which the claim originated, so that the plaintiffs, the owners of the *Hollander*, could abandon their sunken tug in respect of all claims against her. The defendants, therefore, would not gain anything by seeking to enforce a judgment in Holland.

[*The Alne Holme* (1), *Richards* v. *Howell* (2), and *The Rougemont* (3) were referred to.]

Adair Roche, for respondents (plaintiffs), was not called upon.

Collins M.R. It appears to be conceded that there is no jurisdiction in Admiralty to make the order asked for, because s. 34 of the Admiralty Court Act, 1861, does not deal with such a case as that now before us, and, therefore, we have to fall back upon the general powers conferred by the Judicature Act. The learned judge in the Court below seemed to think that he had no power under the Judicature Act, and counsel for the defendants certainly has not been able to satisfy me that such power existed. I think the onus was upon him, and that he has failed to satisfy it.

Stirling L.J. The Admiralty Court Act certainly does not apply in terms, and the only other source of jurisdiction is the Judicature Act, but it appears to me that the section referred to does not touch the present question. Sect. 24, sub-s. 5, begins by stating that "no cause or proceeding at any time pending in the High Court or before the Court of Appeal, shall be restrained by prohibition or injunction; but every matter of equity on which an injunction against the prosecution of any such cause or proceeding might have been obtained, if this Act had not passed, either unconditionally or on any terms or conditions, may be relied on by way of defence thereto." It then continues: "Nothing in this Act contained shall disable either of the said Courts from directing a stay of proceedings in any cause or matter pending before it

(1) (1882) 4 Asp. M. L. C. 591.
(2) [1883] W. N. 159, 168.
(3) [1893] P. 275.

if it shall think fit." Now, that portion of the section is not an enabling clause. It does not confer jurisdiction upon any Court which did not have it before the passing of the Act. It simply keeps alive the jurisdiction which existed prior to the passing of the Act. Therefore it does not apply to the present case. Then sub-s. 7 is as follows: "The High Court and the Court of Appeal respectively, in the exercise of the jurisdiction vested in them by this Act in every cause or matter pending before them respectively, shall have power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as to them shall seem just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim." It is said that, under that sub-section, the Court is entitled to call upon a party to an action before action tried to give security for damages. That does not seem to me to be in accordance with the Act. The Court before the passing of the Act had no jurisdiction so to do, and this clause only enables the High Court and every branch of it to give effect to all the remedies which the parties were, in the language of the Act, entitled to—that is to say, as could have been given by any Court which was made a member of the High Court by the Judicature Act. It seems to me it does not confer jurisdiction upon the High Court to make such an order as is sought here; for no Court had power to make such an order prior to the Judicature Act.

Appeal dismissed with costs.

Solicitor for appellants (defendants): *Charles E. Harvey.*
Solicitors for respondents (plaintiffs): *Thomas Cooper & Co.*

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Admiralty—Collision—Damage — Compulsory Pilotage—Trinity House Outport District—Termination of Voyage—"Into and out of" Harwich Harbour—Merchant Shipping Act, 1894 (57 *&* 58 *Vict. c.* 60), *ss.* 622, 633.

The defendants' steam vessel, inward bound from a foreign port, was boarded outside Harwich Harbour by a pilot duly licensed to pilot "into and out of" Harwich Harbour, at rates fixed according to draught of water, and she was brought by him to an anchorage in a proper place inside the harbour. Here the vessel waited until the tide had risen sufficiently, and she was then taken by the pilot to her discharging quay; but, whilst he was in the act of berthing her, she came into collision with, and damaged, the plaintiff's vessel. It was admitted that pilotage was compulsory "into" the harbour, but it was contended that the defendants were liable for the damage sustained by the plaintiff's vessel on the ground that the compulsion ceased on the vessel being safely anchored, and that the work connected with the transit from the place of anchorage to the discharging quay, and the berthing of the vessel, was voluntary on the part of the pilot in consideration of a small charge, varying with the tonnage, paid by the ship by usage, and recognised by the authorities of the Trinity House:—

Held, by Gorell Barnes J., that the defendants were not liable, for neither the temporary anchorage, nor the charge for berthing, made any difference, as the vessel was under compulsory pilotage until she reached her destination in the harbour.

Action of damage by collision.

The plaintiff was Thomas John Moran, trading as J. Moran & Son, owner of the *Sliedrecht II.* The defendants were owners of the *Ole Bull.*

The question for the opinion of the Court was whether, under the circumstances, the *Ole Bull* was compulsorily in charge of a pilot at the time of the collision with the *Sliedrecht II.*, so as to enable the defendants to raise the defence of compulsory pilotage.

If the Court should be of opinion in the affirmative, judgment was to be pronounced for the defendants with costs. If the Court should be of opinion that the pilot in charge was not compulsorily in charge of the *Ole Bull* at the time and place of the collision, then the defendants admitted that the plaintiff was entitled to recover the damage sustained by the *Sliedrecht II.*

by reason of the collision, and judgment was to be pronounced for the plaintiff with costs, and a reference directed to the registrar assisted by merchants to ascertain the amount of the damage.

The admitted facts were shortly as follows:—

On September 12, 1903, about 8.30 A.M., the *Ole Bull*, a Norwegian screw steam vessel of 1640 tons gross register, on a voyage from Apalachicola in the United States of America to Harwich with a cargo of sawn wood and deals, was boarded, near the Sunk Light, by a pilot who took charge, and at 11.45 brought the vessel to an anchor in the Stour, at a spot about 180 yards to the northward of the north end of the West Quay within the port and harbour of Harwich, this spot being a usual and proper place for vessels to lie at anchor, and to discharge cargo when unable to discharge at a quay. The tide had not then flowed sufficiently to enable the *Ole Bull* to reach any quay berth at Harwich at which her cargo might be discharged. While the vessel was at anchor she was visited and cleared by the Customs authorities, and a boat was sent ashore for orders as to the place at which she was to discharge her cargo. Orders were given for the west side of the West Quay, and, about 1 P.M., the tide having flowed sufficiently, the anchor was —under the orders of the pilot, who had remained on board— hove up, and the pilot proceeded to navigate the *Ole Bull* to her discharging berth, and, in the course of such navigation and while in the act of going alongside a berth at the quay, one rope having been carried from the ship to the quay and made fast, and while navigating over the part of the foreshore to the westward of the quay which had been dredged out in the manner shewn on the chart annexed to the case, the *Ole Bull*, about 1.30 P.M., fell against and did damage to the dredger *Sliedrecht II.*, which was lying moored at or near the west side of the West Quay. The berth to which the *Ole Bull* was being navigated for the purpose of discharging her cargo is situate on the western side of the West Quay and to the southward of the place where the *Sliedrecht II.* was lying. It is 850 yards to the westward of a line drawn from Shotley Spit buoy to the Guard buoy.

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By the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 622, it is provided that, subject to any alterations to be made by the Trinity House, and to the exemptions under Part X. of the Act, pilotage shall be compulsory within the Trinity House outport districts.

Harwich is one of the Trinity House outport districts, and the limits of the district were, by a notice published in the *London Gazette* of November 19, 1852, extended to include the river Stour, so that the pilotage district is now comprised within the following limits: "To and from the Wallet, Hoseley Bay, or the Sunk Light, into and out of Harwich Harbour, and up the river Stour to Manningtree and vice versâ, and to and from all ports and places within the said limits."

John Green, the pilot who took charge of the *Ole Bull*, was duly licensed to conduct vessels from Sizewell Bank buoy up the North Channel to Gravesend and into and out of Harwich Harbour.

The agreed statement of facts contained the following paragraphs:—

"8. Pilotage rates have been fixed by the Trinity House of Deptford Strond for the Harwich district as follows:—

"(A) 1. From the sea or Orfordness to Harwich Harbour.

"2. From the rolling grounds to Harwich Harbour.

"3. From Harwich Harbour to the above-mentioned places the rate varying in each case according to the distance and to size and character of the vessel.

"(B) There are certain rates for pilotage up and down the Stour.

"(C) Boarding money. A charge varying according to the size of the vessel for putting a pilot on board.

"No other rates have been fixed by the Trinity House.

"9. A payment of 10*s.* to 1*l.*, according to tonnage, is by usage charged and paid for taking any vessel from an anchorage in Harwich Harbour to a quay berth, and berthing her, or for mooring her with two anchors. A vessel may be so taken from such an anchorage to a berth and berthed by an unqualified pilot without infringing any regulations of the port or any orders which the harbour master is legally empowered to give. Vessels which arrive in Harwich Harbour in charge of compulsory pilots are in fact frequently left by compulsory pilots at their anchorage, and then taken from anchorage to a berth and berthed or so moored at Harwich by unlicensed persons.

"Moneys earned by pilots under heads A, B, and C have to be accounted for to the Trinity House, and are paid into a common fund.

"Moneys earned as stated in paragraph 9, when charged by and paid to pilots, are properly retained by them and are not . . . . paid into a common fund.

"10. The following sums were paid to the said John Green in respect of his services on the occasion in question, and he gave a receipt for the same in the following terms:—

"'Received of Messrs. Groom & Son the sum of seven pounds six shillings for the pilotage of the SS. *Ole Bull* from sea to Harwich and mooring:—

	£	*s.*	*d.*
Pilotage (vessel exceeding 14 feet draft) .	3	3	0
Pilot cutter (vessel over 1000 tons register)	3	3	0
Mooring alongside berth	1	0	0
	£7	6	0.'

"The first-mentioned sum represents the pilotage rate chargeable under paragraph 8 (A) 1 hereof. The second sum represents boarding money, and the third sum is the charge for berthing her. If the *Ole Bull* had proceeded direct from sea to her discharging berth at the West Quay without anchoring to wait for water, the said sum of 1*l.* would have been charged by the said Green for mooring her in her berth if she had been berthed by him."

1904. Nov. 8. It was admitted, as part of the case—subject to the right of the defendants to object to the admissibility and to comment upon the value, effect, or relevancy of such evidence, or the competence of the witness to speak to such matters as were not questions of fact—that Mr. William Groom, one of the sub-commissioners of pilotage for the Harwich district, would

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state "that it was open to the master of the *Ole Bull* to say to the pilot upon coming to an anchor that he did not require his services any further, and to pay him off there and then; that the pilot could have demanded his money in respect of the pilotage as soon as he dropped his anchor within the limits of the harbour; that (in the opinion of the witness) compulsory pilotage ceases as soon as the pilot brings his vessel to a safe anchorage within the limits of the harbour; and that any service that is performed afterwards is of a voluntary character, and the pilot is entitled to additional pay for such additional service."

The case was adjourned at the request of the defendants to allow of further evidence, and on—

Nov. 18. The principal clerk in the Pilotage Department of the Trinity House, London, was called by the defendants, and stated that, at the time of the collision in question, the pilots at Harwich, in accordance with usage, charged a berthing fee, and got it when they could, and he produced a circular dated March 1, 1904, issued by the Trinity House for the Harwich district, which defined the limits, as already set out, gave the table of rates, and contained the following paragraph: "In addition to the above rates, the following charges for any of the undermentioned services shall be paid, namely, for removing a vessel from her moorings or at anchor to any part of the harbour and leaving her berthed in safety, or for piloting into Felixstowe Dock, and berthing the vessel at the request of the master, for either of these services, 10*s*. for vessels of 500 tons register and under, 15*s*. for vessels exceeding 500 tons and under 1000 tons, and 20*s*. for vessels above that tonnage."

Nov. 19. *Balloch*, for plaintiff, owner of the *Sliedrecht II*. The obligation to employ a pilot terminated on the anchoring of the *Ole Bull* at Harwich, and at the time and place of the collision with the *Sliedrecht II*. the *Ole Bull* was not under compulsory pilotage. The pilot was licensed "to conduct vessels into and out of Harwich Harbour," and, according to the agreed statement of facts, "might have been properly paid off and discharged when the vessel came to anchor." He in fact remained on board; but, for the additional voluntary service he performed, he received additional pay, which he retained and did not pay into a common fund, the usage at Harwich being for a sum of 10*s.* or 1*l.*, according to tonnage, to be charged and paid for taking any vessel from her anchorage to a quay berth and berthing her. It was optional for the master whether he would discharge the pilot on anchoring, so that the further employment of the pilot was not compulsory, and the master could have paid him at the rate fixed for pilotage inwards by the Trinity House, and dispensed with his further services, the vessel having been conducted by the pilot into Harwich Harbour and brought to a safe anchorage in a reasonable and proper place—that is, in this case some 180 yards from the discharging quay. No special knowledge was required for her further navigation, and, therefore, the compulsory pilotage contemplated by s. 633 of the Merchant Shipping Act, 1894—in respect of which the owner of the vessel is not answerable—had come to an end, and the pilot was not, after the anchoring, doing the work of a "qualified pilot acting in charge" under the statute, but was doing work which may be done, and frequently is done, by unqualified persons, and in respect of which the pilot could not be required, or be entitled, under s. 598 of the same Act to supersede the unqualified person, for it is admitted in the agreed statement of facts that the vessel could be taken from her anchorage to the berth by an unqualified pilot without—in the words of s. 596, sub-s. (*c*), of the same Act—"infringing the regulations of the port, or any orders which the harbour master is legally empowered to give." This view is strengthened by the terms of the notice of March 1, 1904, which recognises the customary "charge" for taking the vessel from her anchorage and berthing her, as distinct from the compulsory pilotage "rate" made by by-law under s. 582 of the same Act. This extra charge at Harwich for extra services is, therefore, analogous to the extra remuneration held, in the case of *The Servia—The Carinthia* (1), to be claimable by Liverpool pilots for taking

(1) [1898] P. 36.

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a vessel alongside a landing stage, and to be in addition to, and independent of, the ordinary pilotage rates levied for compulsory pilotage.

Bailhache, for defendants, owners of the *Ole Bull.* It is admitted by the agreed statement of facts that, until, at any rate, the *Ole Bull* reached her anchorage, she was not exempt from compulsory pilotage, and it is submitted that pilotage was compulsory until the vessel arrived at her final place of discharge within the Harwich district, so that the employment of the pilot was compulsory at the time and place of the collision; or the obligatory nature of the pilotage may be stated in this form: that the pilot having taken charge of the *Ole Bull* by compulsion of law at the Sunk Light, and having remained on board and continued in charge, was still compulsorily in charge of the *Ole Bull* at the time of the collision within the meaning of the statute, for the pilot was, within the words of s. 633 of the Merchant Shipping Act, 1894, "acting in charge of the ship within a district where the employment of a qualified pilot is compulsory by law." It is also admitted as part of the case that, "If the *Ole Bull* had proceeded direct from sea to her discharging berth at the West Quay, without anchoring to wait for water, the sum of 1*l.* would have been charged by the pilot for mooring her in her berth."

The two points, therefore, which have to be met by the defendants are: first, that there was a temporary stoppage, which, the plaintiff alleges, terminated the compulsory pilotage; and, secondly, that there was an extra payment for subsequent services which, it is alleged, were not of a compulsory nature. As to the first point, the paragraph in the agreed statement of facts, that the pilot "might have been properly paid off and discharged when the vessel came to anchor," does not preclude the defendants from contending that the pilotage was compulsory up to the discharging quay. It does not conclude the legal position, as it does no more than indicate that, according to the usage at Harwich, when a vessel has temporarily anchored, other persons than the pilot who brought the vessel in are at times employed for the purpose of subsequently berthing the vessel.

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That a temporary stoppage does not terminate the compulsion in respect of pilotage is shewn by *The Rigborgs Minde.* (1) In that case the vessel had been moored at a pier, and, after waiting there, was being taken to her destination when the collision occurred for which her owners were held not responsible, on the ground that the employment of the pilot was compulsory by law, there having been no interruption of the voyage. Brett M.R. in his judgment says: "It has also been argued that the compulsory pilotage had ceased, because the *Rigborgs Minde* had anchored before she was taken into dock, and that, therefore, on the authority of *The Maria* (2), pilotage was not compulsory. But a temporary anchorage has not this effect. It is not so, unless a vessel is finally anchored at her destination." So in the case of *The Mercedes de Larrinaga* (3) the fact of anchoring in the Mersey to wait for the tide was held to make no difference.

With regard to the question of extra payment, the case of *The Servia—The Carinthia* (4) is not analogous, for there the pilot was held entitled to additional remuneration for doing something which was not contemplated as part of the pilot's duty; but here it is admitted that, if the *Ole Bull* had not anchored, the pilot would have had to take her to her final place of discharge within the Harwich district; in other words, no fresh contract would be required or be contemplated, for the relationship of master and servant would not arise, the pilot being in charge within the district for which he was licensed, just as in the case of the *General Steam Navigation Co.* v. *British and Colonial Steam Navigation Co.* (5), the law of which case is illustrated by *The Charlton.* (6)

Balloch, in reply. The principle laid down in *General Steam Navigation Co.* v. *British and Colonial Steam Navigation Co.* (5) does not apply, because there the pilot was engaged to take the ship to a point beyond that at which the accident happened, and the shipowner had to pay a rate which covered his services to this further point: see the judgment in *The*

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(1) (1883) 8 P. D. 132, at p. 135.
(2) (1867) L. R. 1 A. & E. 358.
(3) [1904] P. 215.
(4) [1898] P. 36.
(5) (1869) L. R. 4 Ex. 238.
(6) (1895) 8 Asp. M. L. C. 29.

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Sussex. (1) Here, however, there is evidence of the substitution of a fresh contract establishing the relationship of master and servant, after the compulsory pilotage had ceased on coming to anchor, and the work in respect of the berthing was not only paid for separately, but was work not requiring to be performed by a licensed pilot. In *The Rigborgs Minde* (2) the question turned on the construction of the Act of Parliament relied on, the terms of which were clear, and on the further question whether, by the change of pilots, the compulsory pilotage ceased—questions which do not arise here. In *The Mercedes de Larrinaga* (3) the pilot in fact conducted the vessel from sea to the Eastham Lock, and charged so much a foot draught of water—that is to say, one rate covered the service; but, in the present case, there are two payments—first, a rate for bringing the vessel into the harbour; and, secondly, a special charge for performing the services on which the pilot was engaged at the time of the collision with the *Sliedrecht II.*, which services could be performed by an unqualified person without infringing any regulation. The view taken by the plaintiff is supported by the attitude of the authorities of the Trinity House, by whom a distinction is drawn between the rate for pilotage and the charge for berthing. The collision occurred after the berthing had commenced, for one rope had been put on the quay. It is submitted, therefore, that, at the material time and place, pilotage was not compulsory.

[48 Geo. 3, c. 104, s. 47, and the Merchant Shipping Act, 1894, ss. 606, 618 were referred to.]

Cur. adv. vult.

Dec. 13. GORELL BARNES J. This case has been argued upon an agreed statement of facts, in the nature of a special case, and raises a point as to compulsory pilotage in the port of Harwich. According to the statement, the *Ole Bull* was brought into the port of Harwich by a man named John Green, who was a pilot, and who was licensed, amongst other matters, to pilot into and out of Harwich Harbour. His certificate, according to the date on it—June 14, 1882—must have been granted to him prior to the time of this disaster. I do not know whether it is renewed from year to year; but this case is treated as one in which he holds the Trinity House licence to pilot into and out of Harwich Harbour. He "had boarded the *Ole Bull* about 8.30 A.M. on September 12, 1903, near the Sunk Light, and took charge, and at 11.45 A.M. he brought the *Ole Bull* to an anchor in the Stour," at a spot northward, just a little, of the inlet into which she was to be moved, and within the port of Harwich. According to the statement, the spot where she was anchored "is a usual and proper place for vessels to lie at anchor and to discharge cargo when unable to discharge at a quay." At 1 P.M., the tide having flowed sufficiently, the anchor was, under the pilot's orders, hove up, and he proceeded to navigate the *Ole Bull* to the place at Harwich where she was to be discharged, and "in the course of such navigation and while in the act of going alongside a berth at the quay, one rope having been carried from the ship to the quay and made fast," the *Ole Bull* fell against the *Sliedrecht II.* and did the damage complained of.

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(1) [1904] P. 236, at p. 254.

(2) 8 P. D. 132.

(3) [1904] P. 215.

Now, as I understand this case, or this statement of facts, the only question I have to determine is: whether the pilotage is compulsory or not, for my determination of this question will decide whether the defendants are or are not liable for the damage sustained by the *Sliedrecht II.* as the result of the collision. The point is a short one, for though there were points raised as to the precise wording of certain sections of the Merchant Shipping Act, &c., the main contention which the statement of facts raises is simply this: Whether the pilotage ceased to be compulsory when the *Ole Bull* came to an anchor, or whether it continued to be compulsory until she was moored to the quay. The plaintiff says that the pilotage ceased to be compulsory as soon as the ship dropped her anchor; whereas the defendants say it continued to be compulsory until the vessel got to the quay. The way in which the plaintiff puts the case is substantially this: He says that this pilotage is into or out of the port of Harwich—"into" is the point here—and the man who pilots gets a certain rate, set out in paragraph 8 of the statement of facts, for piloting from the sea or Orfordness to Harwich Harbour, and from the rolling grounds to Harwich Harbour, and that that rate covers what he has got to do to bring her to the anchorage; and that afterwards, if she moved from the anchorage to a berth for discharging at the quay, the ship has to pay, by usage, 10*s.* or 1*l.*, according to her tonnage, for the pilot's taking her from the anchorage to the quay berth and berthing her, or for mooring her with two anchors. The statement of facts contains, amongst other things, this paragraph: "A vessel may be so taken from such an anchorage to a berth and berthed by an unqualified pilot without infringing any regulations of the port or any orders which the harbour master is legally empowered to give. Vessels which arrive in Harwich Harbour in charge of compulsory pilots are, in fact, frequently left by compulsory pilots at their anchorage and then taken from anchorage to a berth and berthed or so moored at Harwich by unlicensed persons." That is the way in which the plaintiff presents this matter. Shortly stated, therefore, the plaintiff says that the ship was compulsorily piloted to the anchorage, and then the duties of the pilot as the compulsory pilot ceased, and from the anchorage to the quay the pilot was voluntarily employed at a slight additional remuneration of 10*s.* or 1*l.* The defendants say he was compulsorily employed right through, from first to last, until he got to the quay, and that temporary anchoring for the purpose of tide makes no difference.

I thought at the time when this case was first presented to me that the statement of facts—or perhaps I ought to say the law as stated—the statement of the legal position of the parties, or those concerned in such matters as this—the pilots, for instance—was so worded as to state the law and to put the defendants out of Court, because paragraph 6 commences with this statement: "The said John Green might have been properly paid off and discharged when the vessel came to an anchor as aforesaid." That, and other passages which it is not necessary to go through, taken together, led, to my mind, to the conclusion that as this case was drawn it was, in fact, stating that the compulsory pilotage legally determined at the anchorage,

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and that after that there was a voluntary arrangement to proceed on. The matter being of some importance outside this particular case, because it affected generally the question of pilotage at the port of Harwich, the case was, on the application of counsel for the defendants, adjourned in order that evidence might be given as to how this matter was dealt with and how the question arose. I think this case has now to be treated as if those statements of legal effect were not in it—I mean one must judge of the case as to the law applicable to the facts partly upon the evidence given and partly upon the statement. Taking all those facts together, I think there is nothing in this case to shew that anything took place between the master and the pilot, if it were material at all, which had the effect of making a distinct new bargain between them. The pilot went on from the anchorage to the quay, and, whatever the legal position is, that position must be determined, I think, apart from special contract. The parties seem to have gone on in what may be called the ordinary course of business. What does that ordinary course come to be? It seems to me that ordinary course leaves the matter open to decision as to what is the real legal obligation and duty of the two parties—that is to say, whether pilotage into Harwich means pilotage to the place where the ship is destined to be discharged, or means pilotage to any spot in the harbour to which she may chance for temporary purposes to be brought. I say that because although the evidence given by the principal clerk in the Pilotage Department of the Trinity House, and the other matters which have been partly shewn by the papers and partly by the statement of facts, do shew that as a matter of fact pilots have been paid their pilotage rate for proceeding to an anchorage, and have obtained a payment afterwards of some small sum for taking a vessel from an anchorage to the proper place of discharge, the impression which I have received from all the matters which have been placed before me is that the pilots have really succeeded in getting this extra payment because of the fact that they are delayed when they come to an anchorage, and have to waste time waiting till the ship can be moved into the place to which she is destined to be moved.

They have succeeded in getting that sum—whether right or wrong in getting it they have succeeded in getting it—I think the papers shew that—and since the matter has been brought out more prominently there has been, as I understand, an alteration made by the Trinity House. The circular put before me is dated March 1, 1904, and relates to the Harwich district, and it contains the rates from the sea, &c., to Harwich Harbour, and gives the figures. Then it contains a paragraph with regard to the charge to be paid for removing a vessel from her moorings or anchorage to any part of the harbour and leaving her berthed in safety. [The learned judge read the paragraph already set out, and continued:—]

So that substantially this circular in a sense authorizes what has been going on for some time apparently, namely, a rate charged into the harbour, and an extra charge if the vessel is removed from moorings or anchor to any part of the harbour and berthed in safety. To my mind, however, that really gives the go-by to the true question in the case, which is what, according to law, is the duty of the pilot on the one hand, and the obligation of the shipowner on the other, with regard to the termination of the compulsory employment? What I mean is that even if there is an extra charge now to be paid, or an extra charge was in former times asked for and obtained, for taking the vessel from the spot at which she has anchored to the berth, that is not, to my mind, at all conclusive of what the compulsion is and when the compulsion ceases. The compulsion seems to me to turn upon the true construction of the Acts of Parliament, or rather the Acts coupled with the licence.

It is admitted, for the purpose of this case, that pilotage is compulsory "into and out of" Harwich Harbour, and so the question comes to be what is pilotage "into" Harwich Harbour. Does it mean that the ship is to be brought to any point in Harwich Harbour at which she is compelled to stop, and then the pilotage ceases to be compulsory? Or does it mean compulsory as long as she is still proceeding to the destination in the port to which she has to go? The point that is exactly to be decided is not, as far as I can ascertain, covered by any distinct authority, and the only observations which I can find which seem to me directly to bear upon it are observations which I myself made in the case of *The Mercedes de Larrinaga*. (1) Now, considering this case, first of all, from what would be the position if the vessel had been brought straight from the sea to the mooring berth, without any interruption at all, it seems to me that the pilotage would be compulsory from first to last. It would be pilotage into the harbour and pilotage to a point which was already fixed upon. Then the question is: Can it make any difference whether the ship is anchored, compulsorily but temporarily, because of the state of the tide? I cannot see that it makes any difference at all. If it did, it would be sufficient to anchor a ship at any spot within the limits of the harbour, and then say the pilotage ceased. I can see no difference between the two positions. It seems to me that what is pilotage into a harbour, where it is left general, must be determined by the place in that harbour to which the vessel is intended and destined to go, and if, for any temporary purpose, she is interrupted in getting there, because of tide, wind, fog, and so forth, she is none the less on the way to the place to which she has to go. I take the general view of this case which is presented by some of those Mersey cases which deal with inward-bound ships, and are practically on the same lines. Those cases are referred to in the judgment I gave in *The Servia—The Carinthia*. (2) Therefore I do not think it would have made any difference if there had been any independent arrangement for payment from the anchorage to the berth; but there was not, in fact, any arrangement, and it was left open, on the footing of what was usually done in the port. It seems to me, therefore, that notwithstanding the fact that extra payment has been asked for, and seems now to be regularly made, it makes no difference with regard to the compulsion, but only fixes the rate of payment. The result, in my judgment, is that the *Ole Bull* was compulsorily in charge of a pilot at the time of the collision, and I understand from the statement of facts that if the Court shall be of that opinion, judgment is to be pronounced for the defendants with costs, but there will be set off any costs of or occasioned by the adjournment asked for by the defendants.

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(1) [1904] P. 215, at pp. 230–32.

(2) [1898] P. 36.

Solicitors for plaintiff, owner of the *Sliedrecht II.*: *Rawle, Johnstone & Co., for Ward & Hugh-Jones, Harwich.*

Solicitors for defendants, owners of the *Ole Bull*: *Thomas Cooper & Co.*

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[IN THE COURT OF APPEAL.]

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Will—Codicil—Revocation—Inconsistency—Admission to Probate—Codicils of same Date—No Evidence of Priority of Execution—Partial Inconsistency.

Primâ facie every testamentary document duly executed in accordance with the provisions of the Wills Act ought to be admitted to probate. But, if there are two testamentary documents of the same date and it cannot be ascertained which of them was executed first, and their provisions are so inconsistent that they cannot stand together, the presumption in favour of admissibility will be rebutted, and neither document will be admitted to probate.

But when the provisions of two testamentary documents, the priority of which is uncertain and in neither of which there are express words of revocation, are apparently inconsistent, the Court will endeavour so to construe the words that if possible the two documents may stand together and may both be admitted to probate as expressing together the whole testamentary intention of the testator.

The statement of the law in Williams on Executors, 7th ed. vol. i. p. 162; 9th ed. vol. i. p. 138, approved and adopted.

A testatrix executed two codicils, both dated the same day, their provisions being to some extent inconsistent. The evidence of an attesting witness proved, in the opinion of the Court of Appeal, that the two codicils were executed on the same occasion and practically simultaneously. There was nothing to shew which was in fact executed first. Gorell Barnes J. refused to admit either codicil to probate, on the ground that an introductory clause in each shewed that it was intended to operate only in the event of the testatrix surviving her husband, whereas she died before him:—

Held, by the Court of Appeal, that, on the true construction of the introductory clause, the codicils were not contingent or conditional, but were intended to operate in any event:

Held, also (by Vaughan Williams and Romer L.JJ., Cozens-Hardy L.J.

doubting), that the provisions of the two codicils were not so inconsistent that they could not stand together, and that both ought to be admitted to probate.

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Appeal from a judgment of Gorell Barnes J., by which he refused to admit to probate two codicils executed by Emily Donald, the wife of Captain Thomas Donald, and dated the same day.

By the settlement, dated August 5, 1862, made upon their marriage, in default of issue of the marriage the trustees were, in case the husband should survive the wife, to stand possessed of the trust funds, subject to a life interest given by the settlement to the husband, in trust for such persons and in such manner as the wife should notwithstanding coverture by will or codicil appoint, and in default of appointment in trust for her statutory next of kin as if she had died intestate and without having been married. In case the wife survived, the property was to be held in trust for her, her executors and administrators.

By her will, dated June 22, 1863, the wife, in exercise of the power, appointed and bequeathed the trust funds and all other her estate and effects whatsoever, as well real as personal, unto her husband, his heirs, executors, administrators, and assigns, absolutely and for ever. And she appointed him sole executor of her will.

The testatrix made a codicil to her will dated January 18, 1886, and thereby she devised and bequeathed to her sister Louisa Bigge, and her heirs and executors, the sum of 3000*l.* free of legacy duty, "in addition to any other legacy or legacies bequeathed by me to her," "payable to her at and after the decease of my husband."

The testatrix executed two other codicils (which were for the purposes of this suit distinguished as A and B). Both of them were in the handwriting of the testatrix, and both bore the date "6th day of October, 1891." In each case "1889" was scratched through and "1891" written after it. Both were attested by the same two witnesses. There was no evidence to shew which of the two was executed first. The two were not identical in their terms. In each of them there were alterations and interlineations which were not initialled.

Codicil A commenced thus: "Whereas I Emily Donald have bequeathed all my property to my husband Thomas Donald, now in case I survive him I hereby appoint the following persons to be executors, Captain Reginald Fullerton and the Rev. William Norman Ramsay." "At the decease of my husband and myself 3000*l*. to my sister Mrs. Arthur Bigge, and 2000*l*. to my sister Miss Julia Townsend. Payable at my death, with my husband's consent or optional the following legacies—300*l*. each to my sisters Miss Julia Townsend and Mrs. Arthur Bigge in addition to the above 3000*l*." Then followed thirteen other pecuniary legacies, and the codicil continued: "Should my husband sell the reversion to the marriage contract trust property then I leave to his executors the sum of 5000*l*. in trust for his estate to make up for the loss and to go to his niece Miss F. C. G. E. Somerset. The rest of my property at my husband's decease to be divided in equal shares between my two sisters Miss Julia Townsend and Mrs. Arthur Bigge and to the survivor for life, and after them in equal shares one 3rd to each of the following children of the Rev. Winslow Hambrough, viz., Worsley Hambrough and Mrs. Agnes Wickham, also one 3rd to Captain Reginald Fullerton and one 3rd to Mrs. Rosalie Eastwood and her children after her.

"This is subject to any legacies I may after this bequeath. Also as to legacies of jewels, furniture, pictures, china, &c., mentioned in inclosed list." Then followed the signature of the testatrix, the date, the attestation clause, and the signatures of the two witnesses.

The codicil B commenced in the same way as codicil A, and was identical down to the appointment of executors. It continued: "At the decease of my husband and myself ~~2000*l*.~~ 3000*l*. to my sister Mrs. Arthur Bigge but *not* in addition to the 3000*l*. already bequeathed to the said Mrs. A. Bigge." Then followed the thirteen legacies which were bequeathed by codicil A. Then came the following: "Should my husband

sell the reversion to the marriage contract trust property then
five thousand pounds to be paid to them
I leave to his executors the sum of 5000*l*. ∧ ~~in trust~~ for his estate to make up for the loss." Then came some words which were illegible, and the codicil continued: "The rest of my property to be divided in equal shares between my two sisters Miss Julia Townsend and Mrs. Arthur Bigge and to the
i.e. half of one
survivor for life and after them in equal shares ∧ one ∧ 3rd
each of
to ∧ the two following children of the Rev. Winslow Hambrough, Worsley Hambrough and Mrs. Agnes Wickham, and one 3rd to Captain Reginald Fullerton and one third to Mrs. Rosalie Eastwood and her children after her. This is subject to any legacies I may after this bequeath. Also as to legacies of jewels and furniture, pictures, &c., mentioned in inclosed list signed by me. In addition to above I bequeath to my two sisters Mrs. A. Bigge and Miss Julia Townsend the sum of 300*l*. each payable at my decease." Then followed the signature of the testatrix, the date, the attestation clause, and the signatures of the two witnesses.

There was no issue of the marriage.

The testatrix died on January 18, 1892. Her husband died on January 28, 1902.

The will and codicils of the testatrix were not proved during his lifetime.

After his death the will and the three codicils were propounded by the plaintiffs, who claimed to be some of the residuary legatees under the codicils of October 6, 1891, and Captain Fullerton, one of the executors named in those codicils. The only defendant originally named was Mr. Moore, who was executor of Captain Donald, and also a beneficiary under his will, the interest which he took under that will being larger if the two codicils of October 6, 1891, were not admitted to probate than if they were.

The defendant by his defence pleaded that the codicils of October 6, 1891, were executed by the testatrix conditionally on her surviving her husband—a contingency which did not happen—and that therefore they were null and void, and ought not to be admitted to probate.

Miss Somerset and Miss Chisholme, both of whom were beneficiaries under the will of Captain Donald, were afterwards allowed to intervene. By their defence they said that neither of the two codicils was intended to take effect unless the testatrix survived her husband, and also that one of the codicils was a rough draft of the other, and that in any case one only of them was intended to take effect, or, in the alternative, that one of them impliedly revoked the other.

Gorell Barnes J. refused to admit either codicil to probate on the ground that the words "now in case I survive him" in each codicil governed the whole of what followed, and that each codicil was intended to operate only in the event of the testatrix surviving her husband—an event which did not happen.

The plaintiffs appealed.

Dec. 10, 13. *Eldon Bankes, K.C.*, and *Barnard*, for the plaintiffs. It is submitted that the learned judge was wrong in holding that the two codicils ought not to be admitted to probate. When there are two inconsistent wills or codicils, the order of their execution being uncertain, the right course is to admit both to probate, and then the Court will give effect to both so far as they are not inconsistent.

[ROMER L.J. Are there any authorities on the point?

Beddall, for the interveners. In *Constantine Phipps* v. *Earl of Anglesey* (1) it was held that, "if there are two inconsistent wills of the same date, neither of which can be proved to be last executed, they are both void by the common law for uncertainty, and will let in the heir-at-law; unless such wills are explained by some subsequent will of the testator, so as to reconcile such inconsistency."

ROMER L.J. I see no distinction between two inconsistent wills and two inconsistent codicils.]

The testator should not under such circumstances be regarded as not having executed any testamentary instrument.

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(1) (1751) 7 Bro. P. C. 443, 452.

If you find that he has in fact executed two testamentary instruments on the same day, but you cannot ascertain which was executed first, it should not be assumed that he had no intention of making a disposition of his property. The two instruments are to be rejected only to the extent to which they are inconsistent, and therefore void for uncertainty. The first object of the Court would be to carry out the wishes of the testator so far as they can be gathered from the two instruments; just as when a testator has executed one instrument after another, it is assumed that he intended by the second to revoke the first so far as the two are inconsistent.

[ROMER L.J. referred to *Downes* v. *Ship*. (1) Do you say that, if both codicils are admitted to probate, the Court of Chancery will hold both to have been duly executed?]

Yes; and the Court will give effect to both to the extent to which they are not inconsistent. That cannot be done unless both are admitted to probate. If the two are consistent, even in one respect only, the Court is bound to admit both to probate, and so give effect to the testator's presumed intention. If both are admitted to probate, regard must be had to both; they must be treated as one instrument. If you refuse probate of both, you wipe out the testator's wishes or intentions altogether, and so inflict a grievous injury on the objects of his bounty. So far as his intentions may be clear, effect would be given to them by striking out the inconsistent provisions from both instruments. Primâ facie every testamentary document which is duly executed is entitled to probate, unless it is shewn to be conditional on the happening of an event which has not happened. Here the codicil of 1886 absolutely revoked in part the original will. Then afterwards the testatrix executed the two documents dated October 6, 1891, and it is clear that she intended her sister Mrs. Bigge to have a legacy of 3000*l*. whether the testatrix survived her husband or not, and if he survived it was to be paid at his death. The codicils on their true construction were conditional only as regarded the appointment of executors, and the two are not so inconsistent that they cannot both be admitted to probate.

(1) (1868) L. R. 3 H. L. 343.

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Beddall, for the interveners. There is no evidence that either of the two codicils was executed before the other. If either of the two stands the will is entirely wiped out; each codicil purports to deal with the whole of the property of the testatrix, and gives away everything from her husband, except his life interest under the settlement of which she had no power to deprive him. It is submitted that the two codicils are so inconsistent that they cannot both stand; even if they were shewn to have been executed on different days they could not both be admitted to probate. The residue is disposed of differently by the two codicils. There may be an implied revocation of a testamentary document. If it had been proved that codicil B was executed several days after codicil A, must it not have been held that B had revoked it? It is not sufficient to prove part of a will; the Court must be satisfied that it has before it substantially the testamentary intentions of the testator: *Woodward* v. *Goulstone*. (1) If there were no date on the document, parol evidence might be given of the date of execution; if no evidence of that date could be given, probate would not be granted. But the presumption is that a document was executed on the date which it bears.

It is also submitted that each of the codicils was conditional upon the testatrix surviving her husband.

[Romer L.J. referred to *Jenner* v. *Ffinch*. (2)]

Bargrave Deane, K.C., and *Willock*, for the defendant Moore. The decision of Gorell Barnes J. turned only on the point that the two codicils were conditional upon the testatrix surviving her husband.

If that is not so, the question of construction must be decided, and the Probate Court has jurisdiction to decide it: *In the Goods of Tharp*. (3) It is submitted that on the true construction of both codicils the condition stated at the commencement extends to the whole of the instrument, and not merely to the appointment of executors: *In the Goods of Spratt*. (4)

If the Court holds that the codicils were not conditional, the

(1) (1886) 11 App. Cas. 469.

(2) (1879) 5 P. D. 106.

(3) (1878) 3 P. D. 76.

(4) [1897] P. 28.

question arises whether they are so inconsistent that they cannot be admitted to probate.

[ROMER L.J. In *Jenner* v. *Ffinch* (1) parol evidence was admitted to shew that a second will was intended to revoke the first.

VAUGHAN WILLIAMS L.J. Probably the evidence was admitted only to shew the intention with which some act was done by the testator. If it was admitted to shew the intention with which certain words were used, I should feel a difficulty in following the decision.]

There is an important difference between the two codicils. Codicil B does not give to Julia Townsend the 2000*l.* which is given to her by codicil A.

THE COURT said that they desired to hear further evidence, and in particular that of the surviving attesting witness, Alfred Vickers, who at the date of the execution of the codicils was butler in the service of Captain Donald.

The other attesting witness was dead.

It was then arranged that Vickers should attend for examination on December 20.

Dec. 20. Vickers attended, and was examined by the Court and by counsel.

The result of his evidence was that he recollected attesting a codicil executed by Mrs. Donald, but that he did not recollect attesting more than one. He said that there was only one occasion on which he attested any document executed by Mrs. Donald. But he recognised his own signature to both codicils when they were shewn to him, and had no doubt that he did attest both.

The result of the evidence is fully stated in the judgment of Vaughan Williams L.J.

Bargrave Deane, K.C., and *Willock*, for the defendant. The result of the evidence is that both codicils were executed on

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(1) 5 P. D. 106.

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the same day, and there is nothing to shew which of them was in fact executed first. They are so inconsistent that neither should be admitted to probate. The testatrix may possibly have thought that the one was a duplicate of the other, but this is not the fact. They are void for uncertainty, for neither of them expresses her whole testamentary intention. Probate cannot be allowed of part of that which was meant to express a testator's whole testamentary intention: *Leonard* v. *Leonard*. (1)

Beddall, for the interveners. When a document is all in one handwriting the presumption is, not that interlineations were made after execution, but rather that they were made before execution: *In the Goods of Cadge*. (2) The will exercised a specific power of appointment. If the testatrix survived her husband she had no power of appointment, but the settled property went to her, her executors and administrators. This shews that the codicils were intended to operate only if she survived her husband. She did not revoke the will, which was to take effect under the power of appointment. The codicils dealt with the property as her own, which it would have been if she had survived her husband.

[Cozens-Hardy L.J. referred to s. 3 of the Married Women's Property Act, 1893 (56 & 57 Vict. c. 63).]

It must be admitted that the evidence does not prove which of the two codicils was executed first. It proves that they were executed on the same day, but not that they were executed at one and the same moment.

Barnard, in reply. The evidence shews that the two codicils were executed on the same occasion—practically simultaneously. The fair inference is that the testatrix understood one of them to be a duplicate or a copy of the other—that she intended to execute a codicil in duplicate. She did not intend one of the codicils to revoke the other. At any rate, one of the codicils should be admitted to probate. Two codicils executed on the same day should not be treated as if they had been two wills. In both codicils the residuary bequest is in effect the same. It is submitted that both should

(1) [1902] P. 243.

(2) (1868) L. R. 1 P. & M. 543.

be admitted to probate, or, if not, codicil A should be admitted. The probate ought to shew that there is no evidence which was executed first.

Cur. adv. vult.

Dec. 21. VAUGHAN WILLIAMS L.J. The question we have to decide is whether two codicils executed by Mrs. Emily Donald, both bearing date October 6, 1891, or either of them, ought to be admitted to probate.

It was argued in the first place that neither of the codicils ought to be admitted, because in each of them there are words which shew that they were intended to take effect only in the contingency of the testatrix surviving her husband. It is said that the words "now in case I survive him" (that is, her husband) do not apply only to the appointment of other executors in the event of the husband dying first, but that the condition overrides the whole, so that the codicils were intended to take effect only in the contingency of the testatrix surviving her husband. In my judgment that contention ought not to prevail. I think that, if you read through the codicils and take note of their provisions in case of the death of the husband, and especially of the words "at the decease of my husband and myself," it is impossible to hold that the condition at the commencement was intended to override the whole instrument. In my opinion the codicils were not intended to take effect only in the event of the wife surviving the husband.

I will now deal with the other point which has been taken. It is said that neither of these two codicils can be admitted to probate having regard to the frame of them respectively, and also having regard to the fact that they bear the same date, and there is nothing on the face of them or otherwise which enables us to say that one of them had priority in time over the other. In my opinion this contention also fails, and both codicils ought to be admitted to probate.

In my judgment the facts which have been proved are as follows:—

Mrs. Donald made a will dated June 22, 1863, which was

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duly executed. She also made a codicil dated January 18, 1886, which purports to be duly executed, and can, I understand, be now proved to have been duly executed. She also made and duly executed two codicils dated October 6, 1891. These two codicils were attested by two witnesses, Prosper Greenwood and Alfred Vickers. Alfred Vickers, who, at the time of the execution of the codicils, was the butler in the service of Captain Donald, has proved the due execution of the two codicils (which have been called A and B respectively) by the testatrix. Vickers has no distinct recollection of codicil B, but, recognising his own signature, he has no doubt that he did witness its execution. He is also certain that there was only one occasion on which he witnessed any document executed by Mrs. Donald. Moreover, he testifies that Captain Donald, who was present on the occasion of the execution of the codicils, called his attention to an alteration in respect of the legacy of 3000*l.*, and, inasmuch as there appears to be no alteration in this respect in codicil A, but only in codicil B, I infer that both documents were executed on this occasion.

An examination of the two documents, which are both in the handwriting of the testatrix, has led me to the conclusion that they were both written in 1889, and were brought into the room for the purpose of being executed and witnessed in the state in which they now are, except as to dates, signature, and attestation.

After the execution of the codicils, codicil A seems to have been placed in the escritoire in the drawing-room where it was executed, whereas codicil B was found after the death of the testatrix in a box belonging to Captain Donald, which had been sent from Bournemouth, where Captain and Mrs. Donald had lived, to Brighton, where he lived after her death.

I think (but this is not essential to the judgment which I am about to deliver) that, when the two codicils were prepared in 1889, codicil B was probably the corrected draft, and A was a later copy based on the draft as corrected, but containing some modifications. But, be this as it may, I think that the testatrix executed A and B in the belief that they were in

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substance duplicates, and then retained A in her own possession and allowed her husband to take possession of B as a duplicate, which, by way of precaution, she had executed in conformity with the requirements of the Wills Act.

The question now arises whether either or both of these codicils ought to be admitted to probate. In my opinion both ought to be admitted. Primâ facie every document purporting to be testamentary, and signed and witnessed in accordance with the provisions of the Wills Act, ought to be admitted to probate. When, however, there are more testamentary documents than one, the presumptive admissibility to probate of the documents may be displaced, because it may be that there is a sequence in the dates of the execution of the documents, which, coupled with the words of the later document, or the inferences to be drawn from those words, leads to the conclusion that the later document was intended as a revocation of the earlier, or, it may be, intended to revoke partially or to modify the earlier document, or, lastly, it may be that, apart from any question of revocation, the Court has to deal with documents which are proved to have been executed on the same date and occasion, or which are undated, and as to which it is impossible to affirm that the one has any priority in time of execution over the other. In this last case, if the documents are so inconsistent that they cannot stand together, in my opinion probate becomes impossible, because the presumption of admissibility to probate of a testamentary document executed in accordance with the Wills Act is displaced.

In my judgment the authorities on this point are reasonably clear.

In dealing with the authorities I will first read a passage from Williams on Executors, 7th ed. vol. i. p. 162; 9th ed. vol. i. p. 138, because that passage in its entirety and in particular the final clause of it has been most emphatically and judicially affirmed. It was affirmed by Sir James Wilde (afterwards Lord Penzance) in *Lemage* v. *Goodban* (1), and by Sir James Hannen in *In the Goods of Petchell.* (2) The passage

(1) (1865) L. R. 1 P. & M. 57, 62.

(2) (1874) L. R. 3 P. & M. 153, 156.

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in Williams on Executors is as follows: "The mere fact of making a subsequent testamentary paper does not work a total revocation of a prior one, unless the latter expressly, or in effect, revoke the former, or the two be incapable of standing together; for though it be a maxim, as Swinburne says above, that no man can die with two testaments, yet any number of instruments, whatever be their relative date, or in whatever form they may be (so as they be all clearly testamentary) may be admitted to probate as together containing the last will of the deceased. And if a subsequent testamentary paper be partially inconsistent with one of an earlier date, then such latter instrument will revoke the former as to those parts only where they are inconsistent" (1) In *Lemage* v. *Goodban* (2) Sir James Wilde said (3): "After carefully considering the authorities cited in argument I retain the opinion expressed on the ex parte application for probate. The case of *Plenty* v. *West* (4), so far as it supports the doctrine that the use of the words 'last will' in a testamentary paper necessarily imports a revocation of all previous instruments, is I think overruled by *Cutto* v. *Gilbert* (5) and *Stoddart* v. *Grant* (6); and the case of *Henfrey* v. *Henfrey* (7) only decides that a second will disposing of the whole estate revokes a former disposition. Cases of the present character are properly questions of construction, and in deciding upon the effect of a subsequent will on former dispositions, this Court has to exercise the functions of a Court of construction. The principle applicable is well expressed in Mr. Justice Williams' book on Executors"—and then he read the passage which I have just quoted. This question was also dealt with by Sir James Hannen in *In the Goods of Petchell.* (8) [The Lord Justice stated the facts of that case, and continued:—] Sir James Hannen said (9): "Where there are two instruments the

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(1) This passage is quoted from the 7th edition of Williams on Executors, p. 162. The passage in the 9th edition, p. 138, is in substance the same.

(2) L. R. 1 P. & M. 57.

(3) L. R. 1 P. & M. at p. 61.

(4) (1845) 1 Rob. Ecc. 264.

(5) (1854) 9 Moo. P. C. 131.

(6) (1851) 1 Macq. 163.

(7) (1842) 4 Moo. P. C. 29; 59 R. R. 331.

(8) L. R. 3 P. & M. 153.

(9) L. R. 3 P. & M. at p. 156.

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later of which in date, purporting to be the last will, does not contain words of absolute revocation, it is a question of construction whether or not it revokes the former. Of course if it be wholly inconsistent with the earlier will there is no difficulty, but where some of the provisions of the former may be made to stand with those of the latter questions of difficulty arise. On this matter there has been a difference in the tendency of opinion amongst the civilians and other jurists who have had to consider it. I must say that if I could have dealt with the question uninfluenced by the later decisions, I should have been disposed to adopt the views of Sir H. J. Fust in *Plenty* v. *West* (1), viz., that in order that two wills should be entitled to be admitted to probate there must be something in the second indicating an intention on the part of the testator that the two instruments should be construed conjointly. But the later decisions are otherwise, and the principle of them must be taken to be correctly expressed in Williams on Executors"; then he read the passage which I have already quoted. Sir James Hannen continued (2): "The law thus laid down was acted upon by my predecessor, Lord Penzance, in *Lemage* v. *Goodban.* (3) In that case there were two instruments, both purporting to be the last will and testament of the deceased. In each will there was a residuary clause, but in the latter it was perfectly unintelligible, and it was impossible to give effect to it. The Court held it was justified in granting probate of both instruments, because the earlier contained a residuary clause which it was thought it was not the intention of the testator to revoke. That precedent I am entitled to act upon in this case. . . . Acting on the decision to which I have referred, I have come to the conclusion that I am justified in holding that the testatrix intended that the residuary bequest, which is found in the first will, but not in the later, should form part of her will, and that by varying in the second instrument the dispositions of the former she did not intend to revoke the residuary clause contained in the earlier paper." Probate was accordingly granted of the two

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(1) 1 Rob. Ecc. 264.

(2) L. R. 3 P. & M. at pp. 156, 157.

(3) L. R. 1 P. & M. 57.

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instruments as together containing the last will of the deceased. I may refer also to *Jenner* v. *Ffinch*. (1) [The Lord Justice read the statement of the facts of that case, and continued :—] The importance of that case is that it shews what is the question which the Court ought to ask itself when there are two testamentary documents as in the present case. Sir James Hannen arrived at the conclusion that you must not in the first instance ask how many testamentary documents did the testatrix intend to constitute her will, but that in the case of documents prior and subsequent in date you must first look at the later document and see what are its provisions, and, having construed its words, ask yourself the question, aye or no, did the testator intend that the later document should be a revocation of the first, or did he intend that the two should be read together. Then Sir James Hannen proceeded to point out that, if the second document is ambiguous, parol evidence of the surrounding circumstances will be admissible in order to enable the Court to determine the intention of the second document. Speaking for myself, I should hesitate to say that that dictum would extend to the admission of parol evidence of the intention of the testator according to the view of those who were present at the time of the execution of the testamentary document. I think the basis of this principle (which, indeed, is plainly laid down in the first case which I cited by Sir James Wilde, that when there is, as between two documents properly executed in accordance with the Wills Act, the question to be solved how far the one affects the other, the Probate Court must to that extent and for this purpose act as a Court of construction) is this—that if a document purports to be testamentary, and it is executed in accordance with the provisions of the Wills Act, primâ facie that document ought to be admitted to probate. In order to reject such a document you have to displace that presumption, and I think this principle does not apply only to documents which have a sequence in the dates of execution, so that you can speak of the one as the prior and the other as the subsequent document, but it applies equally when there are undated documents or docu-

(1) (1879) 5 P. D. 106.

ments of even date. It will be seen that the introductory words of the passage which I have read from Williams on Executors deal with all those cases.

This being so, I must now deal with the question whether these two codicils are so inconsistent that they cannot stand together. I have arrived at the conclusion that they can stand together. And, though it is a principle which primâ facie one would be reluctant to apply, I think the authorities shew that, when there are two properly executed testamentary instruments and it is contended that both ought to be admitted to probate, the principle applied by the Court has been that in construing the documents it will endeavour so to read the words as to support the admissibility of both documents to probate, even though, for the purpose of arriving at that conclusion, it may have to reject a construction of the later instrument or of the two instruments, as the case may be, which is not only possible but may be one which the Court would feel bound to adopt if it was not overmastered by the consideration that it ought not readily to conclude that the testator intended to revoke a properly executed testamentary document in the absence of express words of revocation, and when the inference of revocation can arise only from the construction of the testamentary instrument in question.

I must now deal with the provisions of the two codicils and the differences between them. In the main the beneficiaries are the same persons in both codicils, and the conditions of the application of the provisions are in the main the same, though they are not always expressed exactly in the same way. [The Lord Justice pointed out the differences in the two codicils as regarded the bequest of 3000*l.* to Mrs. Arthur Bigge, and continued :—]

It appears to me that the difference between those two passages is not such as to prevent the two documents being read together. I think that if the two codicils had been written on one piece of paper it would not have been impossible to read them together. Of course, when you have either a single document or two documents the question may arise whether repeated legacies are to be treated as cumulative or substitutional.

I recognise the proposition that when there are two documents containing identical legacies, those legacies are primâ facie to be read as cumulative. But, having regard to the words of these two codicils, and the circumstance which, under the decision in *In the Goods of Petchell* (1), the Court is entitled to take into consideration—I mean the simultaneous execution of the two codicils—it is, I think, manifest that in the present case any primâ facie presumption that the gifts are cumulative has been rebutted.

I cannot usefully go through all the differences between the two codicils in order to point out why I think none of them creates such an inconsistency as to disentitle these two documents to probate at the same time. I may say generally that the very alteration in the order of identical bequests to my mind goes to shew that the two documents were really intended as duplicates, intended to be read together; and, if that conclusion is right, it is manifest that no difficulty can arise as to any bequest being cumulative.

The most difficult point is with regard to the gifts of residue. It is said that the provisions of the two residuary gifts are so different and that the two codicils exhibit such inconsistencies that they cannot be read together. [The Lord Justice referred to the two residuary gifts, and continued:—]

But, although the frame of the residuary clause in codicil B is not quite the same as that in codicil A, yet the beneficiaries are the same, and it seems to me that, without really doing any violence to the words, the two may be construed in such a way as not to be inconsistent. In my opinion, if there had been two documents of prior and subsequent dates which had contained these same two residuary clauses, it would not have been a proper inference to draw that the testatrix intended by the one to revoke the other. The question, of course, is not the same when there are, not a prior and a subsequent document, but two documents simultaneously executed. In the latter case there are, no doubt, considerations which tend in opposite directions. On the one hand, it seems to me that primâ facie, if the Court would not have inferred that a subsequent instrument had revoked a prior instrument on the ground that by reason of their inconsistency they could not stand together, it ought to be more, not less, easy to arrive at the conclusion that the two documents were intended to stand together when they were simultaneously executed. But, on the other hand, I do not overlook the fact that if, as here, there are two documents executed simultaneously, not in sequence, there is a difficulty which does not arise when you are considering the question whether a later document has revoked a prior one. The question is not quite the same in the two cases. Still in either case the ultimate question which stands behind is, aye or no, can you read the documents in such a way that they can stand together? That is the question which you are really asking when you ask, does the second document revoke the first? And it is really the same question when you are asking, can both of two documents simultaneously executed be admitted to probate? The question in that case as in the other is really, can the two documents be so read as to stand together? Upon the authorities I come to the conclusion that, if on any reasonable construction the two documents can stand together, it is the duty of the Court of Probate to admit both documents to probate. In my opinion, therefore, this appeal should be allowed, and both codicils should be admitted to probate.

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(1) L. R. 3 P. & M. 153.

ROMER L.J. Upon the evidence I have come to the conclusion that these two codicils were duly executed on the same day, and on the same occasion, and practically simultaneously, and that when they were executed they were in the condition in which they now appear—that is, with the present erasures and interlineations. That being so, from the circumstances of their execution, and from a consideration of the contents of the documents, I come to the conclusion that the two were intended to be, and that they must be, read together as if executed simultaneously, and that neither was intended to revoke the other; that the two documents are to be taken together as expressing the testamentary intentions of the testatrix at the time of their execution. That being so, the

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question which of the two as a matter of fact happened to be first executed is immaterial, for, in my opinion, no importance was intended to be, or can be, attributed to the one document rather than to the other by reason of the order of execution.

The question then arises, What, as a matter of law, ought to be done as regards probate? Now, of course, if there are two testamentary documents, and it is to be gathered that one was intended to revoke the other altogether, but it cannot be ascertained which was intended to be revoked, neither of them can be proved, e.g., if there are two wills, each purporting to revoke all prior testamentary documents and it cannot be ascertained which of the two was executed last. But when there are two testamentary documents, and the Court is able to gather that one was not intended wholly to revoke the other, but that both were intended to be effective, at any rate to some extent, then I think, on authority and on principle, that the two documents must be admitted to probate, so that effect may be given to them, so far at any rate as circumstances will permit. How far that could be done would be left to a great extent to a Court of construction to determine. The authorities to which my brother Vaughan Williams has referred shew, I think, that this is the correct view of the law, and I need not further dwell upon them. I certainly think that those authorities ought to be followed, for in a case such as that which we are now considering it would have been lamentable if the Court had been compelled to hold that, because effect cannot be given to some parts of the two documents, therefore both must be set aside, and neither of them admitted to probate, or allowed to have any validity whatever. Both documents, then, should be admitted to probate, and the effect of the two together must be determined by a consideration of their contents, and of the circumstances under which they were executed. So far as they can stand together effect should be given to them both. The cases shew how far Courts of construction have gone in the way of reconciling documents which they felt it their duty to endeavour to reconcile, and how they have struggled, if I may use the expression, to reconcile dispositions which on the face of them might at first sight appear to be somewhat irreconcilable. But, of course, if after doing its best the Court finds that there are dispositions which are perfectly inconsistent, that it is impossible to reconcile them or to say that one of the two is to take effect at the expense of the other, then effect cannot be given to them so far as they are inconsistent. If, for instance, there are two dispositions which cannot be reconciled, and the Court cannot say which was intended to override the other without knowing in what order the two documents were executed, and that fact cannot be ascertained, then the Court would be driven to hold that both dispositions are invalid.

Now applying these general considerations to the circumstances of the present case, and having regard to the findings of fact with which I commenced my judgment, I see no difficulty in holding that both these codicils can and ought to be admitted to probate. Regarding them as executed simultaneously, and both intended to take effect, I have no doubt that they cannot be treated as contingent on the wife surviving the husband. I should come to that conclusion looking at codicil B alone. But when I look at codicil A all difficulty disappears. Grammatically speaking, the only limitation in codicil B of the expression of the intentions of the testatrix to the event of her surviving her husband is with reference to the appointment of the two executors. And when you look at the rest of the document it seems to me impossible to say it is clear that the document as a whole was intended to be contingent on the wife surviving. [The Lord Justice then referred to several of the provisions of codicil A, and particularly to "the rest of my property at my husband's decease to be divided in equal shares," and continued :—]

The testatrix could not have meant her property to be divided in her lifetime. She must have meant that the property was to be divided at her husband's decease, assuming that he would survive her. The onus is on those who contend that these documents are to be treated as contingent, and in my opinion that onus has not been discharged.

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That being so, I see no difficulty in holding that both codicils should be admitted to probate, for they can be reconciled at any rate in part, and that is sufficient to justify their admission to probate. But, without trespassing on the province of a Court of construction, I must say, if it be necessary to go into the point, that I can see no difficulty in wholly reconciling the two documents. Bearing in mind that the two documents are to be treated as having been executed simultaneously, I see no difficulty in holding that the pecuniary legacies common to them both were intended to be the same legacies, and not to be duplicated. But, even if this had not been the correct view, it would not have prevented the admission of both documents to probate, for then the legacies would be cumulative. Take next the gift of the 3000*l.* to Mrs. Arthur Bigge. Taking the two documents together, I have no hesitation in saying that the condition that that gift was not to be in addition to the 3000*l.* already bequeathed to that lady is to affect the bequest of that 3000*l.* The legacy of 2000*l.* to the sister Julia Townsend is in codicil A, and not in codicil B. But the gift in A is not contradicted by anything in B, and, therefore, takes effect. As to the gifts of residue, I gather they are to be read together as meaning the same thing, and I can see no difficulty in holding that the residue was intended to go in thirds. The difficulty which might arise if you looked at B alone is removed when you look at both documents together. Nor can I see any difficulty in reconciling the times of payment of the residue. They do not conflict, but the time of payment is mentioned in the one codicil and not in the other.

Perhaps I have rather gone beyond my province, and have discussed matters which ought strictly speaking to be left to a Court of construction. But, so far as I have dealt with questions which are properly questions of construction, I do not intend to bind in any way the Court before which those questions may ultimately come for final consideration and determination. All I say is that I can see no difficulty in holding that the two documents were intended to stand and can stand together, and that they should therefore be admitted to probate as having been executed simultaneously. In my opinion, therefore, the appeal should be allowed.

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COZENS-HARDY L.J. Gorell Barnes J. declined to admit the two documents which have been called A and B to probate, on the ground that they were both conditional or contingent testamentary documents, intended to operate only in an event which has not happened. I entirely agree with my learned brothers that that view cannot be supported. On the construction of the documents it seems to me reasonably plain that they were not intended to take effect only in that event.

That being so, it becomes necessary to consider the second point with which Gorell Barnes J. did not deal—namely, whether the two documents are so inconsistent that they ought to be treated as void, and not to be admitted to probate. My learned brothers are clear that both A and B ought to be admitted to probate. I feel so much doubt about it that, if the decision had rested with me alone, I should have desired further time for reflection. But my doubt is of no practical moment, and I will therefore only state in a few words what my difficulties are. To me it is almost incredible that the testatrix could have intended both these documents to be effective. They are not duplicates, and there are very important differences between them. They are not consistent: they contain dispositions of residue, which, taken separately, have different meanings. In A the residue is divided into four parts; in B into three parts. I feel the greatest doubt as to which of these two was intended to be operative. If I had to guess from internal evidence, I should rather conclude that it was document B and not document A. But it is said that, according to the evidence of Vickers, they were executed simultaneously on one occasion, and that they ought to be regarded as one document, or to be construed as if they had been one document. Even so, ought not the Court of construction to be told by the Court of Probate which part of the single document came first, and which second? We all know that in construing a testamentary document it is very important to know which part comes first and which second. These doubts, which I

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have briefly indicated, have not been removed after such consideration as I have been able to devote to the case.

Appeal allowed.

Bargrave Deane, K.C., asked the Court to construe the codicils. It would save expense to do so.

THE COURT declined to make any other order than that both the codicils were to be admitted to probate, and that administration with the will annexed be granted to Captain Fullerton, one of the residuary legatees.

THE COURT also directed that it should appear in the order that in the opinion of the Court the two codicils were executed simultaneously.

Solicitors: *Frere, Cholmeley & Co.; Wilde, Moore & Wigston; Booth & Smee, for FitzHugh & Co., Brighton.*

W. L. C.

1904
Dec. 5.

IN THE ESTATE OF FRANCIS REUBELL BRYAN.
THE BOARD OF EDUCATION v. REUBELL AND ANOTHER.

Probate—Practice—Administration—Nominee of Board of Education—Sureties dispensed with.

The Court dispensed with sureties to the administration bond where the person applying for administration was a nominee of the Board of Education.

MOTION on behalf of the Board of Education that sureties to the administration bond to be given by John Charles Gabriel Sykes, the nominee of the said Board, might be dispensed with.

Francis Reubell Bryan, late of 185, Faubourg St. Honoré, Paris, in the Republic of France, died there on November 21, 1902, leaving a will dated October 23, 1902.

On August 2, 1904, the will was pronounced for in solemn form of law, on terms which were filed and made a rule of Court.

Pursuant to the said terms, the Board of Education (the residuary legatees named in the will) applied, by their nominee, for a grant of letters of administration with the said will annexed, the executors named in the will having renounced probate thereof.

Barnard, for John Charles Gabriel Sykes, the duly appointed nominee of the Board, now applied that the bond of the applicant should be accepted without sureties. There is no reported authority precisely in point, but the proviso to s. 81 (1) of the Probate Act, 1857, which enacts that, in the case of the Solicitor to the Treasury, even the bond itself may be dispensed with, is analogous.

JEUNE P. Sureties may be dispensed with.

Solicitor: *Solicitor to the Treasury.*

(1) 20 & 21 Vict. c. 77, s. 81, is as follows: "Every person to whom any grant of administration shall be committed shall give bond to the judge of the Court of Probate to enure for the benefit of the judge for the time being, and, if the Court of Probate or (in the case of a grant from the district registry) the district registrar shall require, with one or more surety or sureties, conditioned for duly collecting, getting in, and administering the personal estate of the deceased, which bond shall be in such form as the judge shall from time to time by any general or special order direct:

"Provided that it shall not be necessary for the solicitor for the affairs of the Treasury or the solicitor of the Duchy of Lancaster applying for or obtaining administration to the use or benefit of Her Majesty to give any such bond as aforesaid."

H. D. G.

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Dec. 19.

MORRISSEY *v.* MORRISSEY.

Divorce — Practice — Variation of Settlements — No Issue of Marriage — Matrimonial Causes Act, 1859 (22 *&* 23 *Vict. c.* 61), *s.* 5—*Interests of Unborn Persons—Consent of all living Persons interested—Reconveyance of Trust Property to Innocent Settlor.*

Where the only living persons who could be interested under the terms of a marriage settlement consented, the Court, upon the petition of the innocent settlor, whose marriage had been dissolved, and notwithstanding that the interests of unborn persons might be adversely affected, ordered the trustees to reconvey to the petitioner the whole of the settled property.

Motion upon the registrar's report upon a petition to vary the settlement made on a marriage now dissolved.

From the registrar's report it appeared that the decree nisi obtained by Gertrude Morrissey, dissolving her marriage with Richard Patrick Morrissey on the ground of desertion and adultery, was made absolute on August 2, 1904.

There was no issue of the marriage.

Under an indenture of settlement, dated November 25, 1892, the property, all brought into settlement by the petitioner and now producing an income of about 240*l.* per annum, was held in trust for the petitioner for life; on her death, for the respondent for life; and, on the death of the survivor and in default of issue, for the surviving brothers and sisters of the petitioner and the children of brothers or sisters dying in the lifetime of the petitioner.

The respondent had an income of 155*l.* per annum. There were no children of a deceased brother or sister of the petitioner in existence.

The registrar, after hearing counsel on behalf of the petitioner and the solicitor for the respondent, and with consent of the respondent and of the brothers and sister of the petitioner, recommended that the Court should order that from and after the date of such order all the powers and interests of the respondent, and all the interests of the brothers and sister of the petitioner under the said indenture of settlement, should, they consenting, be extinguished; and the registrar further submitted for the consideration of the Court whether the property should not be reconveyed to the petitioner notwithstanding the possible interests of the issue (if any) of one of the said brothers and sister of the petitioner, in the event of such brothers or sister dying in the lifetime of the petitioner.

Bargrave Deane, K.C., and *R. H. Pritchard*, for the petitioner. If the deed remains, she has nothing to leave to her children (if any) by a future marriage. Her sister and brothers, who are as yet unmarried, consent that the settled property shall be reconveyed to the petitioner, because they feel that this somewhat peculiar settlement was really executed in contemplation of the petitioner having children.

[JEUNE P. Can I take away a possible interest that any issue of the sister or brothers might have if they were to marry, and if they died in the lifetime of the petitioner?]

Meredyth v. *Meredyth and Leigh* (1), it is submitted, is a sufficient authority. The object of this settlement, made by the petitioner herself, undoubtedly was to provide for herself and her children. In the events which have happened, no children she may have, if she marry again, can take anything. The brothers and sister are the people whose duty it would be primarily to provide for their own issue, in case either of them marry, and they recognise the justness of the petitioner's present application by consenting thereto. In these circumstances, would not the Court be doing only what is "fit," as expressed in the 5th section (2), by acceding to the application in its fullest extent?

J. D. Pepys, for the trustees, submitted to any order that the Court might deem it right to make.

JEUNE P. made the order asked for, extinguishing all the interests of the respondent and of the persons, other than the

(1) [1895] P. 92.

(2) 22 & 23 Vict. c. 61, s. 5.

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petitioner, having interests under the settlement, and directed the trustees to reconvey the settled property to the petitioner, freed from the trusts of the settlement.

Solicitors for petitioner: *Pritchard, Englefield & Co.*
Solicitors for trustees: *Lee & Pemberton.*

H. D. G.

1905
Jan. 23.

IN THE ESTATE OF GEORGE SHAW.

Probate—Practice—Lunacy of one of the Executors after proving Will—Revocation of Probate—Fresh Grant to remaining Executors—Form of Grant.

Where one of three executors, who had proved a will, subsequently became of unsound mind, the Court, on the application of the others, revoked the grant and made a fresh grant of probate to the applicants, reserving power to the lunatic, in case he should become of sound mind and apply, to join in the probate.

PROBATE MOTION.

George Shaw died on August 12, 1904. He left a will and codicil dated respectively March 13, 1901, and September 3, 1902, whereby he named as his executors Richard Skerrett, George Overton Aston, Fanny Elizabeth Shaw, and Ellen Louisa Shaw.

On September 2, 1904, probate was granted to all except Richard Skerrett, who had previously renounced.

About September 1, 1904, Fanny Elizabeth Shaw was attacked with paralysis, rendering her unable to sign her name; and her mental faculties also became affected.

Notice of motion was now filed on behalf of George Overton Aston and Ellen Louisa Shaw to revoke the probate, and for a fresh grant of probate to be made to themselves, reserving power to Fanny Elizabeth Shaw to take probate if and when she should recover.

The next of kin of Fanny Elizabeth Shaw had been served with notice of the motion.

Barnard moved the Court, and referred to Tristram and Coote's Probate Practice, 13th ed. p. 191, where mention is made of a case thus: "See *Sowerby*, on Motion, December, 1891."

GORELL BARNES J. The note in Tristram and Coote's Probate Practice, 13th ed. p. 191, is correct. The case of *In the Goods of Sowerby* is reported in 65 L. T. 764, from which it appears that the fresh grant was made, limited till such time as the lunatic executor should recover his sanity; but when the matter came to be worked out in the registry, it was probably found that the more convenient course was not to limit the grant, but to let the other executor take probate, reserving power to the lunatic to apply to join in the probate, should he desire to do so on recovering his sanity. In the present case I revoke the probate, and make a fresh grant to the applicants, reserving power to Fanny Elizabeth Shaw to join in this grant, should she, on recovering her sanity, wish to do so.

Solicitors: *Burton, Yeates & Hart, for Johnson, Barclay & Lowe, Birmingham.*

H. D. G.

1904
July 25, 29.

COPSEY *v.* COPSEY AND ERNEY.

Divorce—Condonation—Adultery—Desertion—Revival—Decree of Dissolution of Marriage.

Desertion for two years without reasonable excuse revives condoned adultery, whether the petitioner be husband or wife.

Houghton v. *Houghton*, [1903] P. 150, followed.

UNDEFENDED SUIT by husband for dissolution of marriage.

The petitioner and respondent were married in 1888.

In or about September, 1901, the petitioner traced his wife to Brighton, where he found her living in adultery with the co-respondent. For the sake of the children he took her back to live with him.

On September 23, 1901, she disappeared again with the children, and he had since been unable to trace her.

When the present petition was in contemplation after the statutory period of two years' desertion had expired, inquiries were made by the petitioner's solicitors. The respondent's mother declined to give information as to the respondent's address; but, upon its being pointed out that this refusal might necessitate an application to the Court for substituted service, facilities were afforded for personal service to be effected.

At the hearing, the only adultery proved was that which had been condoned in September, 1901. The desertion since that time was established.

Harold S. Simmons, for the petitioner. The decision in *Houghton* v. *Houghton* (1) governs this case. The principle is the same whether a husband or a wife happens to be the petitioner. The condonation in either case is conditional on the future observance of matrimonial duties. [He also referred to *Binney* v. *Binney*. (2)]

Cur. adv. vult.

1904. July 29. GORELL BARNES J. This was a suit for divorce by the petitioner, which was undefended by the respondent and co-respondent. The parties were married in 1888, and the case for the petitioner was that his wife had committed adultery with a man named Erney in or about the month of August, 1901.

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(1) [1903] P. 150, 152.

(2) (1893) 69 L. T. 498.

I think that the petitioner saw his wife at Brighton, that he spoke to the co-respondent, and that the co-respondent admitted he had been at Brighton; and I think, if I remember rightly, that the landlady from the place at Brighton proved that the respondent and co-respondent were there at the time alleged, and were there under such circumstances as led to the inference of adultery. The petitioner, having learnt what had taken place, took his wife back, and they appear to have lived together for a short time; but on September 23, 1901, the respondent deserted the petitioner and disappeared. Efforts to trace her were eventually so far successful that both she and the co-respondent have been personally served, but no evidence whatever has been adduced to shew that they were living together or that they had committed adultery after the period in or about August, 1901, at Brighton. It is quite possible that that may have been really the case, but no evidence was forthcoming with a view to prove it.

On February 16, 1904, the husband filed his petition asking that his marriage might be dissolved, and relying on the desertion to revive the condoned adultery.

The only cases cited to me were *Houghton* v. *Houghton* (1) and *Binney* v. *Binney* (2), and I reserved judgment in order to look into those authorities. Having now considered them, it seems to me that the ordinary doctrines applicable to condonation, namely, that it is conditional upon the proper observance of the matrimonial relationship and the absence of any guilt with regard to any further matrimonial offence, apply to this case as much as they do to the case of a wife's suit against her husband. In the present instance the wife undoubtedly committed a further matrimonial offence when she deserted her husband without just cause in September, 1901, and that state of things has continued until the present time. I see no reason why the ordinary rule as to condonation should not apply in

(1) [1903] P. 150, 152.

(2) 69 L. T. 498.

this case as well as it did in *Houghton* v. *Houghton*. (1) I am, therefore, of opinion that the petitioner is entitled to a decree nisi for the dissolution of his marriage, and I pronounce that decree accordingly, with costs against the co-respondent, who appears to have lodged at the petitioner's house and to have known that the respondent was the petitioner's wife. The petitioner is also entitled to an order for the custody of the children, as I understand that he now asks for such an order, though the petition does not, in terms, pray for it.

Solicitors for petitioner: *Milner & Bickford.*

H. D. G.

1905
Feb. 6.

GORDON *v.* GORDON.

Divorce—Petition for Variation of Marriage Settlement—Service—Respondent an uncertificated Bankrupt—One of the Trustees also an uncertificated Bankrupt and his Address unknown—Notice to Official Receiver in Bankruptcy—Service dispensed with.

The Court dispensed with service of a petition to vary a settlement, made on a marriage now dissolved, in a case where the respondent and one of the trustees were uncertificated bankrupts and the address of the said trustee was not known, and where notice of the motion to dispense with service had been given to the chief official receiver in bankruptcy.

Snelling v. *Snelling*, (1890) 63 L. T. 263, followed.

THIS was a motion on behalf of the petitioner, Mary Hamilton Gordon, that personal service of the petition for variation of settlements, filed on January 16, 1905, on the respondent, Rowland Huntly Gordon, and on Albert Carlisle Herts, one of the trustees named in the said settlement and petition, might be dispensed with, or for such other order in regard to service upon them as the Court might see fit to direct.

It appeared that the two other trustees had been personally served.

The petition alleged that Albert Carlisle Herts, one of the

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(1) [1903] P. 150.

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trustees of the settlement, which was dated April 29, 1903, had, by deed dated June 9, 1903, retired from the trust, and the trust securities now stood in the names of the remaining two trustees. It was further alleged that the said Albert Carlisle Herts was adjudicated a bankrupt on February 23, 1899, and did not obtain his discharge, and that he was again adjudicated a bankrupt on August 13, 1904, and had not obtained his discharge.

Inquiries had been made of the official receiver in bankruptcy and of the late solicitors for the said Albert Carlisle Herts, but nothing was said to be known as to his whereabouts. The same solicitors, who still acted for the respondent, had stated, in response to inquiries, that the respondent was abroad and not likely to return at present, and that they were not aware of his address. A certain friend of the respondent, to whom the petitioner's solicitors were referred for further information, stated that he was in Canada, but that his whereabouts were not known. The official receiver in bankruptcy was acting as trustee in the respondent's estate, and counsel for the petitioner also represented the chief official receiver on this motion.

Barnard, for the petitioner, moved to dispense with service, and asked the Court to follow *Snelling* v. *Snelling*. (1)

GORELL BARNES P. made the order as asked, dispensing with service of the petition for variation of the marriage settlement, both in respect of the respondent and the absent trustee.

Solicitors: *Linklater, Addison, Brown & Jones.*

H. D. G.

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(1) 63 L. T. 263.

1904
Dec. 9, 10, 12.

THE BRITANNIA.

Admiralty—Collision—Fog—Fog Signal forward of Beam—Duty to stop Engines—Regulations for Preventing Collisions at Sea, 1897, *art.* 16.

Two steam vessels, proceeding in opposite directions, came into collision during a dense fog off the coast of Portugal. Those in charge of the plaintiffs' vessel did not "stop her engines" in accordance with art. 16 of the Regulations for Preventing Collisions at Sea, on "hearing, apparently forward of her beam, the fog signal of" the defendants' vessel, because another vessel was sounding her whistle apparently on the port quarter and overtaking her; whilst those in charge of the defendants' vessel alleged that they did not stop her engines on first hearing the whistle of the plaintiffs' vessel, because two other vessels sounding their whistles, one on each bow, helped to ascertain the position of the defendants' vessel, which was a long way off, and as soon as the whistle was distinctly made out to be on the starboard bow the engines were stopped:—

Held, by Gorell Barnes J., that both vessels were to blame, as both had infringed the positive directions as to stopping the engines contained in art. 16. In the case of the plaintiffs' vessel, it would have been incumbent on the alleged overtaking vessel to have stopped when she heard the whistle of the plaintiffs' vessel indicating that she was stopped, so that any danger would have been averted. In the case of the defendants' vessel, as distance and bearing cannot be at once definitely determined in fog, it was no excuse for a breach of the rule that the whistle of the other vessel was heard apparently a long way off.

ACTION of damage by collision.

The plaintiffs were the owners of the *Ribera*. The defendants, and counter-claimants, were the owners of the *Britannia.*

The case is reported on the question of the imperative necessity of steam vessels obeying the second paragraph of art. 16 of the Regulations for Preventing Collisions at Sea, 1897. (1)

On September 15, 1904, about 7 A.M., the steamship *Ribera*, of 3582 tons gross register and 28 hands, from Sunderland to

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(1) Art. 16: "Every vessel shall, in a fog, mist, falling snow, or heavy rain-storms, go at a moderate speed, having careful regard to the existing circumstances and conditions.

"A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel, the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over."

Genoa with a cargo of coal, was in the neighbourhood of the Burlings off the coast of Portugal in a dense fog. She was steering S.S.W. by compass, and was making about two or two and a half knots with her engines working dead slow. Her whistle was being regularly sounded for fog, and another vessel was sounding her whistle apparently on the port quarter and overtaking her. In these circumstances, the plaintiffs alleged that those in charge of the *Ribera* heard about three points on the port bow, some distance away, the whistle of a vessel sounding for fog which proved to be the *Britannia*—a steel screw steamship of 3129 tons gross register, 363 feet long, engines of 182 horse power nominal, a crew of 36 hands, from Patras to Liverpool with a general cargo. A long blast was immediately given in answer by the *Ribera*, and the ships approached each other sounding their whistles, that of the *Britannia* broadening with each succeeding whistle. After a longer interval than that between any of her former signals, the *Britannia* suddenly blew a long blast, and came into sight about three points on the port bow, and about three ship's lengths off, apparently acting under a starboard helm. The engines of the *Ribera* were reversed full speed, her whistle twice blown three short blasts and her helm put hard-a-port; but the *Britannia* came on, and the two vessels came into collision, the stem and port bow of the *Ribera* striking the starboard side aft of the *Britannia*.

The defendants alleged that the *Britannia* was proceeding on a course of N. 12° W. true, or about N. ½ E. magnetic, at the minimum speed at which the vessel could be kept under control, that of two to three knots, and that she was sounding her whistle regularly for fog, with the whistles of two vessels, one on each bow, drawing clear, when the whistle of a third vessel, which proved to be the *Ribera*, was heard a long way off. According to paragraph 3 of the defence: "As soon as it was distinctly made out and found to be about one and a half points on the starboard bow, the engines of the *Britannia* were stopped and, when she had lost her way, her whistle was kept sounding two long blasts in accordance with the regulations. Meanwhile as she (the *Britannia*) lay stopped the first-named whistles slowly drew clear astern, and that of the *Ribera* gradually broadened until it was nearly abeam on the starboard side, the engines of the *Britannia* were then set on slow ahead and single long blasts again blown on her whistle, but shortly afterwards the *Ribera* suddenly loomed through the fog abeam heading for the *Britannia* and coming on at great speed. Two short blasts were instantly blown on the whistle of the *Britannia*, her helm put hard-a-starboard, and her engines full speed ahead in the hope of going clear; but the *Ribera* came on apparently under port helm," and the collision occurred, both vessels sustaining considerable damage.

Each side charged the other with (inter alia) failure to comply with arts. 15, 16, and 29 of the Regulations for Preventing Collisions at Sea, by not properly sounding their whistle, by not stopping their engines, and by the neglect of proper precautions.

1904. Dec. 9, 10. *Aspinall, K.C.*, and *Alexander D. Bateson*, for plaintiffs, owners of the *Ribera*. The steamer sounding her whistle on the port quarter was not an imaginary vessel. She was there in fact coming up astern, and her position was a "circumstance" within the meaning of the second paragraph of art. 16 of the sea rules, rendering it dangerous for those in charge of the *Ribera* to stop the engines on hearing the whistle of the *Britannia*. They are, therefore, to be excused for an apparent breach of the article; whilst the *Britannia* by neglecting to stop in the first instance, and then stopping too long and starboarding, brought her whole length across the track and made a target of herself to be run into.

Pickford, K.C., and *Lewis Noad*, for defendants, owners of the *Britannia*. Those in charge of the *Ribera* are to blame for not stopping in accordance with art. 16. They could have sounded the two prolonged blasts on the whistle enjoined by art. 15, which would have served as a signal to the vessel alleged to be on their port quarter, and so avoided any danger in that direction; but the extent of the damage shews that they kept on at an excessive speed.

In the case of the *Britannia* there was no breach of the rule as to stopping, for this was done as soon as it was distinctly made out that the *Ribera* was some one and a half points on the starboard bow, and the engines were not again set on slow ahead until the sound had gradually broadened to the extent of being nearly abeam. Even if it were, in strictness, an infringement, it was of that class which the Court holds in no way contributes to the collision, as in the case of the slight obstruction to, and position of, the lights in *The Fire Queen* (1), that is to say, there was no negligence for which the *Britannia* can be found to blame.

[*The Koning Willem I.* (2) and *The Inventor* (3) were referred to.]

Alexander D. Bateson, in reply.

Cur. adv. vult.

Dec. 12. GORELL BARNES J. This collision took place between the *Ribera* and the *Britannia* on September 15 last off the coast of Portugal, in the neighbourhood of the Burlings. According to the plaintiffs' case, the *Ribera* was proceeding about S.S.W. by compass, and was going at dead slow speed, sounding her whistle for fog. The *Britannia* was on a course of N. 12° W. true, which I believe was about N. ½ E. magnetic. The weather was a dense fog, and these two vessels, when visible to each other, were at an extremely short distance apart—in their preliminary act the plaintiffs say about three lengths and the defendants say about 150 feet.

The plaintiffs' case, shortly stated, is that while going dead slow, about two or two and a half knots, sounding their whistle and having another vessel on the port quarter, apparently overtaking them, a whistle from the *Britannia* was heard about three points on the port bow. It is alleged that the *Ribera* answered, and that the two vessels approached, each sounding their whistles, that of the *Britannia* broadening with each succeeding whistle; that afterwards the *Britannia* suddenly blew a long blast and came into sight about three points on the port bow, about three ship's lengths off, apparently acting under a starboard helm; that the engines of the *Ribera* were thereupon reversed full speed, her whistle blown three short blasts twice, and her helm put hard-a-port; but that the *Britannia* came on and with her starboard side about the after rigging struck the stem and port bow of the *Ribera*, doing considerable damage. That is the plaintiffs' account, and, in my judgment, shews that the plaintiffs have no case, as far as they are concerned, because it is obvious that the plaintiffs' vessel did not stop her engines in accordance with the provisions of art. 16 of the Regulations for Preventing Collisions at Sea. She kept on at the speed at which she was going until she ran into the other ship, except that, immediately before the collision, she is said to have reversed. Yet the surveyor called on behalf of the plaintiffs considered that at the time of the collision the *Ribera's* speed was about three knots, and that appears to have been in accordance with the damage done, because the *Ribera's* stem cut into the *Britannia* in the way shewn on the photographs. So that this vessel, the *Ribera*, is clearly to blame, unless there is some excuse for her not stopping her engines, but keeping on and striking the other vessel, going three knots in a fog so thick that the vessels could only see each other at an extremely short distance. The plaintiffs, in order to get out of that difficulty, suggest that they were reasonable and acted properly in not stopping their engines, because they had another vessel on their port quarter, and they were therefore afraid that if they stopped the other vessel might come up and overtake them. That appears to me, and to the Elder Brethren of the Trinity House who are assisting me, an altogether inadequate excuse. The other vessel, four points on the port quarter, in the locality in which she was, was probably going the same way as the *Ribera*; and there seems to be no sufficient reason for not stopping the engines of the *Ribera* for the other vessel ahead of her when it was proper to do so, simply because another vessel was sounding her whistle some distance away on the port quarter. Even if it were necessary for that other vessel on the quarter to act herself, she would have had the signalling of the *Ribera*—first her long blast signal and then, when her way was run off by stopping the engines, the signals for a vessel stopped in the water. So there is nothing in that excuse. The difficulty was felt by counsel for the plaintiffs, and their real attack was upon the defendants.

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(1) (1887) 12 P. D. 147.

(2) [1903] P. 114.

(3) Ship. Gaz. Nov. 29, 1904.

The defendants' case is one of a different character, but it raises more or less similar points. Their case is that going on a N. 12° W. true course, at between two and three knots, they heard the whistles of two other vessels, one on each bow; that whilst those two whistles were drawing clear they heard the whistle of a third vessel, which proved to be the *Ribera*, a long way off; and then there comes a remarkable paragraph in the statement of defence, which to my mind clearly indicates the difficulty felt by the pleader. [The learned judge read paragraph 3 of the defence already set out, and continued:—] So that, according to that paragraph, and according to the evidence given on the part of the defendants, it is quite clear that the *Britannia* did not stop her engines at the time when she first heard the sound of the *Ribera's* whistle. She afterwards stopped them when, as the pleader said, she had "distinctly made out" the whistle, and "found it to be a point and a half on the starboard bow." How they found it out is not clear. It is said that there was no reason for stopping at first, because the whistle was a long way off, and other ships were of assistance in judging the situation and distance, and there was no breach of art. 16 by the *Britannia*. That is a view of this case with which I cannot agree. It appears to me that it was the positive duty of those on the *Britannia* to stop their engines as soon as they heard that whistle for the first time. It is not true to say that because a whistle sounds distant those on the ship hearing it are entitled to treat it as distant. Many and many a case in this Court has shewn that an apparently distantly sounding whistle has really been close to. It is not correct, again, to say that a whistle having been heard it can be located so as to be certain it is at a precise bearing on the bow. Case after case in this Court shews that that is not the case. It seems to me, having regard to the general features of this case, that it was known that that whistle was the whistle of a vessel which must have been coming the other way, and it was their bounden duty under art. 16 to stop their engines. I do not desire to be any party to weakening the effect of that rule. If this Court were to hold that upon hearing a whistle which sounded to be distant a vessel was justified in not stopping, although its position was not ascertained, except that it sounded a long way off, every case in this Court would be that the whistle sounded such a long way off that the ship was justified in not stopping. In this case the defendants say, "Well, but it would not have made any difference at all if we had stopped, because when we heard it again at a later period, and made it out, we did stop the engines, and remained stopped for something like ten minutes or a quarter of an hour"; and counsel for the defendants argued that having stopped so long as that it could not have made any difference if the engines had been stopped when the whistle was first heard. That is an argument I cannot possibly agree with. I think difficulty might be felt in dealing with such an argument if this Court were not bound by rules and were free to consider mere contribution to the collision; though even then it would be very difficult to hold in such a case as this that there was no contribution to the collision by a vessel which did not stop in the first instance. But those rules have been interpreted over and over again, and this Court must be satisfied that the non-stopping could by no possibility have contributed to the collision. In this case, if the *Britannia* had stopped her engines in the first instance her progress would have been stopped, and she would not have reached the spot at the time of the collision, and the other vessel would have gone across her bows. There would have been altogether different results; and to my mind that second point on the part of the defendants entirely fails.

There is, however, another point in this case upon which I desired to consult the Elder Brethren, and upon which I have taken their opinion. That point is this: The defendants say that, after they did stop their engines for something like ten minutes or a quarter of an hour, the *Ribera* was heard sounding her whistle and the whistles were upon the starboard hand of the *Britannia* till the *Ribera* got a mile away and abeam, or nearly so; that then the defendants set their engines slow ahead for four minutes; and that suddenly they saw the *Ribera* 150 feet off on the starboard beam. The defendants, after contending that there was no object in stopping in the first instance, go on to say that at any rate they navigated with caution afterwards, and cannot be held to blame for not navigating with caution in such circumstances. That all depends upon whether I am prepared to accept the story told by the defendants, and I confess I am not prepared to do so. It seems to me hopeless to contend that the sound of the whistle of the *Ribera* was really ever brought anywhere near on their beam by the motion of the two vessels on their original courses, and I have come to the conclusion that the defendants were not justified in keeping on, as they did, for four minutes or so, in the circumstances which must have happened. What looks probable is that this vessel, the *Britannia*, stopped and lay stopped for some little time, with a swell setting from a northerly direction, and that she may and in fact must have fallen away somewhat from her heading, and this so-called broadening of the sound of the other vessel's whistle was in reality produced by alteration in the heading of the *Britannia*. The story told by the *Britannia's* witnesses strikes me as an extremely improbable one. It appears to me, therefore, that when the *Britannia* was going ahead for four minutes she was in fact running into danger the whole time. She must have been in fact running towards the other vessel the whole time. Though her engines were put ahead extremely shortly before the collision she was run into whilst still going at a speed of three knots; and, taking the facts in this case to be such as I have indicated, I have asked the Elder Brethren whether, in their opinion, it was cautious and prudent navigation to go on at slow speed, working steadily ahead, for four minutes, without making absolutely certain of the position of the other vessel. They think it was not, having regard to the facts of this case. That the defendants' vessel did fall off somewhat in the way I have suggested seems to be probable, because I cannot believe that all the angle of the blow, which was a right angle, was produced by the plaintiffs' porting at

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THE BRITANNIA.

Gorell Barnes J.

the last moment. It must have been contributed to by alteration on the part of the defendants' vessel. The result is that on these two grounds I think the defendants' vessel must also be held to blame for this collision, and my judgment must be that both ships are in fault.

Solicitors for plaintiffs, owners of the *Ribera*: *Waltons, Johnson, Bubb & Whatton.*

Solicitors for defendants, owners of the *Britannia*: *Thomas Cooper & Co., for Hill, Dickinson, Dickinson, Hill & Roberts, Liverpool.*

T. L. M.

1905
Feb. 23.

THE GLENGARIFF.

Admiralty—Collision—Queenstown Harbour—Narrow Channel—Regulations for Preventing Collisions at Sea, 1897, *art.* 25.

The waterway forming the entrance to Queenstown Harbour is a narrow channel within the meaning of art. 25 of the Regulations for Preventing Collisions at Sea, and, therefore, every steam vessel must, when it is safe and practicable, keep to that side, marked by buoys by the local authorities, of the fairway or mid-channel which lies on the starboard side of such vessel.

ACTION of damage by collision.

The plaintiffs were the Lough Fisher Steam Shipping Company, Limited, owners of the *Lough Fisher*.

The defendants were the City of Cork Steam Packet Company, Limited, owners of the *Glengariff*.

The case raised the question of the application of the narrow channel rule (1) to the entrance to Queenstown Harbour.

On June 30, 1904, about 7.30 P.M., the weather being fine and clear, the wind fresh from the W.S.W., and the tide the first of the ebb of the force of about two knots, the screw steamship *Lough Fisher*, belonging to Barrow, of 418 tons gross register, engines of sixty-one horse-power nominal, and manned by a crew of eleven hands, bound from Ellesmere Port to Cork with a cargo of coal, was proceeding at about eight knots on a N.N.E. magnetic course up the entrance channel of Queenstown Harbour, to the westward of the buoyed fairway, when those in charge of her saw about one and a half to two miles off, broad on the port bow, a vessel which proved to be the steel screw steamship *Glengariff* of 1285 tons gross register, engines of 450 horse power nominal, and a crew of thirty-one hands, on her usual passage through Queenstown Harbour from Cork to Liverpool with general cargo, cattle, and thirty passengers.

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(1) Regulations for Preventing Collisions at Sea, 1897, art. 25: "In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel."

According to the plaintiffs, as the two vessels approached the Bar Rock buoy, the helm of the *Lough Fisher* was ported a little, and one short blast sounded on her whistle; but the *Glengariff* appeared to disregard the whistle, and, therefore, the helm of the *Lough Fisher* was ported a little more, whilst her engines were slowed, and almost immediately afterwards reversed full speed, her helm put hard-a-port, and three short blasts sounded on her whistle; the port side of the stem of the *Lough Fisher*, however, came into contact with the starboard bow of the *Glengariff*, and both vessels sustained considerable damage.

The owners of the *Lough Fisher* charged the *Glengariff* with (inter alia) a breach of the crossing rule (art. 19) in neglecting to keep out of the way when she had the *Lough Fisher* on her own starboard side, also with a breach of art. 22 in attempting to cross ahead of the *Lough Fisher*, and a breach of art. 25 in neglecting to keep to that side of the channel which lay on her starboard hand.

According to the defence, the *Glengariff* was heading straight down Queenstown Roads, keeping on the southern side of the fairway, and making from twelve to thirteen knots, when those in charge of her observed, at a distance of about two miles, and bearing broad on the starboard bow, a vessel which proved to be the *Lough Fisher* coming up to the westward of the fairway, and on the wrong side of the channel. The *Glengariff* was kept on her course, heading to pass immediately to the southward of the Bar Rock buoy, but on the *Lough*

Fisher sounding one short blast, and appearing to be acting under a port helm, as if intending to cross the bows of the *Glengariff*, causing danger of collision, the engines of the *Glengariff* were stopped and reversed full speed, three short blasts sounded on her whistle, and her helm put hard-a-port, but the collision occurred.

The owners of the *Glengariff* charged the *Lough Fisher* with (inter alia) failing to take proper steps in due time to pass the *Glengariff* port side to port side, porting at an improper time, and in breach of the local rules (1), embodying art. 25 of the sea regulations, not keeping on her proper side of the fairway.

Aspinall, K.C., and *A. D. Bateson*, for plaintiffs, owners of the *Lough Fisher*.

Laing, K.C., and *H. C. S. Dumas*, for defendants, owners of the *Glengariff*.

For the plaintiffs on the narrow channel and crossing rules, *The Ashton* (2) and *The Leverington* (3) were cited. For the defendants on the narrow channel rule, *The Gustafsberg* (4); on the crossing rule, *The Velocity* (5) and *The Pekin* (6); also Marsden's Collisions at Sea, 5th ed. (1904) p. 444.

BARGRAVE DEANE J. This collision was brought about by the *Lough Fisher* crossing the bows of the *Glengariff*, and the damage done shews that, at the material time, both vessels had way on them. It is true that the master of the *Glengariff* says that he was stopped, and when I asked him the question he said he was going astern through the water; but the mate, who was called, said that he was stopped in the water, which would mean that he still had, with the tide, about two knots over the ground. The *Glengariff* is a great deal larger and more powerful than the other vessel, and that speed would be fast enough to cause the undoubted damage to the stem of the *Lough Fisher*, which was drawn over to starboard. This damage was done by the starboard bow of the *Glengariff* near the hawsepipe, the patent anchor in the hawsepipe being driven right through the bow of the *Glengariff*, and there is no doubt that was the hard substance which caused the damage to the stem and bow of the *Lough Fisher*.

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(1) By-laws of the Cork Harbour Commissioners, made March 22, 1899, in pursuance of the Cork Harbour Acts, 1820 to 1883, and sanctioned by the Board of Trade, April 8, 1899:—

"4. The fairway commences at Roche's Point, and is bounded on the east side to Carlisle Fort by the shore, and on the west by the Harbour Rock and Turbot Bank buoys."

"5. From Carlisle Fort to the Bar Rock buoy, the fairway is bounded on the east by the red buoys marking the shoals on the eastern side of the harbour, and on the west by an imaginary line from the flagstaff at Camden Fort to sixty fathoms S.E. b. E. of No. 7 black buoy; from thence to No. 8 Government buoy, coloured black, and from No. 8 buoy to the Bar Rock buoy."

"55. Any regulations for preventing collisions at sea for the time being in force, under the provisions of the Merchant Shipping Acts, shall be deemed to apply to the port . . . . provided that where any inconsistency arises between the general regulations and the said by-laws, the provisions of the by-laws shall prevail."

(2) [1905] P. 21.

(3) (1886) 11 P. D. 117.

(4) [1905] P. 10.

(5) (1869) L. R. 3 P. C. 44.

(6) [1897] A. C. 532.

This case has given me a good deal of anxiety, because it involves a very important question. The entrance to Queenstown Harbour is in one sense a very narrow entrance; that is to say, it is very narrow to the southward—only a few hundred yards—where vessels must come in, and then there is a fairway which has been marked by buoys by the local authorities. It leads a little to the eastward of north until you come up further, and then it leads more to the westward, but to the westward of that long stretch of fairway there are several hundred yards—I think we have worked it out at about 400 or 500 yards—of navigable water.

The question is, What is the effect of the various rules in such a locality? There is art. 25, requiring steam vessels in narrow channels, when it is safe and practicable, to keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel. What is a fairway? A fairway is practically defined by this article to be mid-channel. There is no rule which says that you must keep in the fairway, but the rule says that you must keep to the starboard side of the fairway or mid-channel in narrow channels. What is a narrow channel? I do not think it has ever been laid down what is a narrow channel. There have been cases in which certain places have been held to be narrow channels, and in which definite decisions have been given on definite facts; but this is the first case, as far as I know, in which the question whether Queenstown Harbour is a narrow channel has been raised. I have discussed this question at considerable length with the Elder Brethren of the Trinity House who are assisting me, and they are strongly of opinion that this is a narrow channel, and that the channel extends from one side to the other of the whole of the navigable channel. If that is right—and I so hold—then it is the duty of every steam vessel entering to pass up on that side of that mid-fairway which lies on the starboard side of such vessel, and of every vessel coming down to keep to that side which lies on her starboard side.

The result of this finding is that the *Lough Fisher* must be held to be in the wrong. She was away to the port side of that fairway, and right over on the port side of that navigable narrow channel. I have no doubt that the intention of the *Lough Fisher* was, by hugging that port side of the narrow channel, to cheat the tide, which was ebb, and when she got up to the light on the port hand to hug round the shore under a starboard helm, and so get into the harbour; but when she got abreast of that light those in charge of her saw ahead and on their port bow a steamer, which was coming down on the starboard side of the fairway. The vessel, which was the *Glengariff*, was, according to the rule I have just laid down, in her proper water. She was on her starboard side of that fairway—not necessarily in the fairway, but on her starboard side of the centre of that fairway—coming down. The *Lough Fisher*, when she found herself with her port bow open to the starboard side of the *Glengariff*, did not accept the position under art. 19 and keep her course. She ported, which she had no right to do. If she was intending—it is not suggested she was—to get into her right water by crossing the bows of the other vessel, so as to get on to the starboard side of the channel, then she had no right to put the *Glengariff* in that position. The *Glengariff* assumed, according to the evidence of her master, that the *Lough Fisher* was going to starboard and continue the course which she had been adopting of hugging the shore and passing away to the westward. The only doubt is whether the master of the *Glengariff* is altogether free from blame for not stopping his engines sooner. I have consulted the Elder Brethren on this point, and they do not think that he stopped his engines as soon as he might have done; but they think, and I agree, that he is absolved because he was put into a false position by the action of the *Lough Fisher*; and that he was entitled to assume that that vessel, having got out of her proper water, was intending, as she evidently did intend, to starboard her helm and go to port. It was not until he found that she was porting, so as to cross his bows, that he stopped; and I think, in the circumstances, he did it then as early as he was justified in doing it. The result is that the *Lough Fisher* must be held alone to blame.

Solicitors for plaintiffs, owners of the *Lough Fisher; Pritchard & Sons.*

Solicitors for defendants, owners of the *Glengariff*: *Thomas Cooper & Co.*

T. L. M.

[IN THE CONSISTORY COURT OF EXETER.]

1904
July 29;
Sept. 26.

THE VICAR AND CHURCHWARDENS OF PAIGNTON v. ALL HAVING INTEREST.

Ecclesiastical Law—Faculty—Second Communion Table—Chancel Screen with Gates—Refusal of Faculty for erection on Chancel Screen of Crucifix and Figures of Virgin Mary and St. John—Ancient Rood Stairs and Rood Loft Door—Proposed Restoration of pre-Reformation Screen and Rood—Evidence—Discretion—Superstitious Reverence.

So much of an application for a faculty for a chancel screen and other works in a parish church as asked that the Court would sanction by faculty the placing above the centre of the chancel screen a sculptured group of life-size figures in oak, representing Our Saviour upon the Cross and the Virgin Mary and St. John, was refused where it appeared that, if the faculty was granted as prayed, the Court would be thereby authorizing the restoration of the pre-Reformation screen and rood formerly in the church.

The vicar and churchwardens of a parish church, in which the ancient rood stairs and rood door were still existing, petitioned the Ordinary for a faculty authorizing the placing in the church of a second Communion Table and a chancel screen with gates, having on its top a platform, gallery

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or loft on which the ancient rood door would directly open, and above its centre, upon a carved pedestal somewhat higher than the level of the loft floor, a sculptured group of life-size figures in oak representing Our Saviour upon the Cross and the Virgin Mary and St. John; the loft to be about six feet in width, and the cornice of the screen to stand on each side about a foot or eighteen inches higher than the loft floor. The suit was undefended, and it was proved in evidence that the services in the church were conducted strictly in accordance with the Book of Common Prayer, with extra services as allowed by the bishop of the diocese, subject to the Reservation of the Sacrament in certain cases. It was also proved that the church was left open in the daytime without a caretaker, and that the organ, the service books, and other articles of church furniture in the chancel required protection:—

Held, that the erection in the church of the pre-Reformation screen and rood as proposed in the identical positions occupied by them before the Reformation would, so far as related to the group of sculptured figures proposed to be placed on the screen, be unlawful, or if not unlawful be inexpedient, and that consequently a faculty must only be decreed for the chancel screen without the group of figures surmounting it.

A faculty was also granted for a second Communion Table; and the Court authorized the chancel screen being provided with gates, on the ground that sufficient necessity for a chancel screen with gates had been shewn in evidence.

THIS was a cause of faculty instituted on behalf of the Rev. John Trelawny Trelawny-Ross, D.D., the vicar, and William Edward Tucker and Gilbert Distin, the churchwardens, of the parish of Paignton with Marldon, in the county of Devon and diocese of Exeter, for the purpose of obtaining a faculty for placing in the north chapel of the parish church of St. John the Baptist, Paignton, a second Communion Table; for erecting in the church a chancel screen with gates and surmounted by a crucifix with figures of the Virgin Mary and St. John, and for effecting in the church certain consequential works of a minor character.

The citation in the suit, duly served on July 3, 1904, recited that the vicar and churchwardens had by their petition represented that it was proposed "to fit up the north or Lady Chapel of the parish church of Paignton aforesaid for week-day celebrations of the Holy Communion and services with altar cross and two candlesticks; to put a carved oak screen surmounted by the holy rood—that is to say, the crucifix with the figures of the Virgin and St. John—from the south side of the chancel arch to the north wall of the north or Lady Chapel; to put a carved oak parclose screen between the choir and the north or Lady Chapel; to move a mural tablet below the rood-loft door to a suitable place, and to move the pulpit to a more suitable place."

No appearance was entered for any opponent.

July 29. The cause was heard before the Chancellor of the Diocese of Exeter (C. E. H. Chadwyck-Healey, Esq., K.C.).

Evidence in support of the petition was given orally in Court both by the vicar and one of the churchwardens and by another witness. From their evidence it appeared that the parish vestry had on February 11, 1904, passed an unanimous resolution approving the design for the chancel screen proposed, and in favour of the application for the faculty being made to the Court, and that a second Communion Table in the north chapel was much required for use in connection with the Communion Services held in the church on weekdays, when the number of communicants who attended was smaller than on Sundays, but would probably be increased by the services being held in the chapel. The result of the remainder of the evidence of the witnesses with regard to the chancel screen and other points in the case is fully stated in the judgment.

H. C. Richards, K.C., for the petitioners. On the evidence before the Court the grant of a faculty for the second Communion Table and the lower portions of the chancel screen, including the chancel-screen gates, would clearly be in accordance with precedents in this and other dioceses (1), and the only question for discussion is as to the faculty issuing for

(1) See *The Vicar and Churchwardens of St. John, Timberhill* v. *The Rectors, &c., of the Same*, [1895] P. 71, at pp. 85, 86; *In re St. Agnes, Toxteth Park*, (1885) 11 P. D. 1 (cases where chancel-screen gates were sanctioned by faculty), and *The Vicar and Churchwardens of St. Peter's, Eaton Square* v. *The Parishioners of the Same*, [1894] P. 350 (a similar case, in which a second Communion Table was also authorized), and *In re St. Mark's, Marylebone Road*, [1898] P. 114 (a decision as to the grant of a confirmatory faculty for a side chapel containing a second Communion Table).

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the erection above the chancel screen of the proposed group of figures of Our Saviour upon the Cross, the Virgin Mary, and St. John. This group of figures forms an actual representation of an essential historical event, and can lawfully and appropriately be placed as an architectural decoration on a chancel screen in a parish church in the position in which the petitioners propose to place it under a faculty, which the Ordinary has only power in his judicial discretion to refuse if there is any probability of the group, or any of the figures of the group, being the object of superstitious reverence: *Phillpotts* v. *Boyd* (1); *Clifton* v. *Ridsdale* (2); *Hughes* v. *Edwards*. (3) To bring about a refusal of the faculty on this ground there ought, however, to be before the Court some affirmative evidence of the existence of "the probability of abuse." Not only in the present case has no evidence to this effect been given at all, but, on the contrary, the undisputed facts that the services in the church are conducted strictly in accordance with the Book of Common Prayer, and the directions of the bishop of the diocese raise the strongest inference against there being any danger of abuse by superstitious reverence, which inference the Court ought not to disregard. The Court, therefore, ought to decree the faculty as prayed without alteration.

[He referred to *In re St. Anselm, Pinner* (4); *The Vicar and Churchwardens of Great Bardfield* v. *All having Interest* (5); *The Rector and Churchwardens of Barsham* v. *The Parishioners and Inhabitants of the Same*. (6)]

Cur. adv. vult.

Sept. 26. THE CHANCELLOR. This is an application by the vicar and churchwardens of the parish of Paignton with Marldon for a faculty to adapt the north chapel in the parish church for week-day celebrations of the Holy Communion by placing therein a second Holy Table provided with a cross and two candlesticks, and by inclosing the chapel with a carved

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(1) (1875) L. R. 6 P. C. 435.

(2) (1877) 1 P. D. 316; 2 P. D. 276, at p. 353.

(3) (1877) 2 P. D. 361.

(4) [1901] P. 202.

(5) [1897] P. 185.

(6) [1896] P. 256.

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oak screen; also to erect a chancel screen surmounted by a crucifix with the figures of the Virgin Mary and St. John; to move a mural tablet now placed below the ancient rood-loft door to another place, with consequential alteration in the position of the pulpit. Citation with intimation was issued out of the registry of this Court, and was duly served. No opposition was entered, and the cause came before the Court for hearing on July 29 last.

The chief question for the consideration of the Court, and that to which almost all the arguments of counsel were directed, is whether or not a faculty ought to be decreed to authorize the erection upon the proposed screen of the group of figures above mentioned.

The church of Paignton is an ancient building and was formerly fitted with a chancel screen, as plainly appears by the stairs and door still remaining, by which access was afforded to the rood loft. The drawings attached to the petition, supplemented by the evidence given in Court, shew that it is proposed to erect, in the place formerly occupied by the ancient screen, a new screen of carved oak, the top of which will form a platform, gallery, or loft six feet in width, the carved cornice of the screen standing on each side about a foot or eighteen inches above the floor level of the loft. The ancient rood-loft door will open directly upon this platform or loft. In the centre of the screen above the gates to the chancel it is desired to erect the crucifix, with the attendant figures of the Virgin and St. John. They are to be life-size, of oak and uncoloured. The drawing shews that the group is intended to stand upon a carved pedestal somewhat raised above the loft floor. The whole of the work, beautiful in itself, is offered to the parish by an anonymous donor. A vestry meeting was held, at which the vicar, the churchwardens, and eight others were present, and by them the design was approved. Evidence was given at the hearing that the services of the church are conducted strictly in accordance with the Book of Common Prayer, with such extra services as are expressly authorized by the bishop, subject to this, that the Holy Sacrament is reserved for the sick by leave of the bishop. It is reserved in the Church, but

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not upon the Holy Table. The surplice is worn by the clergy officiating in the Communion Service as well as in all other ministrations.

Now it is obvious that what is proposed is the re-erection in the church of the pre-Reformation screen and rood which no doubt formerly existed, and which, if an inference may be drawn from what was done elsewhere in the diocese, was finally removed in 1561, or perhaps earlier. As to the screen itself, except the proposed gates, with which I will deal presently, no question arises. But it is otherwise with respect to the group of figures to which I have referred. To decree a faculty for the entirety of what is now proposed would manifestly be to approve of the restoration to the church of that which was formerly pronounced unfit or improper to remain in it, with the result that similar applications under circumstances similar to the present to restore the holy rood to the place it occupied before the Reformation in other parish churches must be conceded. But it was argued that this case is covered by the decisions of superior Courts, which of course are binding upon me, and which I should certainly endeavour loyally to follow, and that the Court has no alternative but to make a decree in accordance with the prayer of the petition.

The first question which the Court has to set itself to answer is this: Is what is proposed to be done lawful or unlawful? If it be unlawful there is an end of the matter; but if it be lawful the next question follows: Has the Court a discretion to refuse the application? Now the legality or illegality of what is proposed depends upon the purpose of the object or use to which it is or may be put, and the consequences which will, or probably may, follow from its erection. That, put shortly, is I think the result of the authorities, and that in fact is the way in which the argument on behalf of the petitioners was shaped. It was said that the figure of Our Lord crucified, with the attendant figures, was introduced into the design for decorative or architectural purposes only. This argument was obviously to be expected. It is one with which we are familiar in this class of case. But it suggests the question, Why, if a decorative or architectural effect only is sought, do the petitioners fix upon this particular subject, treated or arranged in a way made familiar to us by Roman precedent and with a ceremonial history, when other decorative and obviously innocent adjuncts to the screen might be found, even if the screen were not thought perfect in itself? I put this question to the vicar, who gave evidence in support of the application, and the only answer I obtained was that the donor stipulated that this particular group of figures should be there. There is no decision that the crucifix, with or without the two attendant figures, is of itself unlawful. The test as laid down by the Privy Council in *Phillpotts* v. *Boyd* (1) is: "For what purpose has it been set up? To what end is it used? and is it in danger of being abused?" In that case their Lordships desired it "to be clearly understood that nothing decided in that case affects the question of superstitious regard being paid contrary to the 22nd Article of Religion to any representations or images that are, or may at any time be, set up in churches": *Phillpotts* v. *Boyd.* (2) There the representation of the Crucifixion was not in question; but in *Hughes* v. *Edwards* (3) the crucifix with the figures of the Virgin and St. John were carved on the centre panel of the reredos there in question, and in consequence the case was much relied upon as an authority in this Court. In his judgment Lord Penzance deals with the particular question under consideration in this way:—

"I repeat, therefore, here what I stated in the case of *Clifton* v. *Ridsdale* (4), that the Court of Appeal in *Phillpotts* v. *Boyd* (5), in authorizing the reredos set up in Exeter Cathedral, pronounced that erection lawful, though it included many sculptured images, on the express ground 'that it had been set up for decoration only, declaring that it was not in danger of being abused, and that it was not suggested that any superstitious reverence had been or was likely to occur to any of the figures upon it.' I quote these words now because the Court of Appeal in *Clifton* v. *Ridsdale* (6) approved them, and they embody the principle which was applied in that case, and has

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(1) L. R. 6 P. C. 435, at p. 466.
(2) L. R. 6 P. C. 435, at p. 467.
(3) 2 P. D. 361.
(4) (1876) 1 P. D. 316.
(5) L. R. 6 P. C. 435.
(6) 2 P. D. 276, at p. 353.

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to be applied in this. In doing so the first observation that occurs is this, that the disputed sculpture is unquestionably in its general character an architectural decoration; it consists of arches, pillars, or columns, and figures sculptured on a solid stone in relief depicting the scene of the Crucifixion, in which the figures and postures of those who are standing by the cross are matters of artistic treatment. It is, moreover, part of a larger architectural decoration forming one compartment only out of three, the other two being of a similar character, though from the nature of their subjects free from objection. This, in my judgment, at once establishes a considerable distinction between the present case and that of *Clifton* v. *Ridsdale* (1), where the crucifix could hardly be said to constitute an architectural decoration at all, or, at any rate, did not appear in the opinion of the Court to have been set up for that purpose. This distinction, however, is far from deciding the case, for it remains to be considered whether, whatever be the purpose for which the sculpture in question is proposed to be erected, and how fitly soever it may be described as an architectural decoration, it is nevertheless in danger of being abused and 'superstitious reverence' likely to be paid to any of the figures upon it": *Hughes* v. *Edwards*. (2)

After reference to the argument that the sculptured panel might if in a Roman Catholic church be taken to supply the place of the crucifix on the altar, his Lordship observes: "I think it is clear that such a thing might be; but that is not enough, it must appear to the Court that it is probable. The case is singularly bare and destitute of all collateral or ancillary facts which might help the Court to such a conclusion. There is no evidence that either in the arrangements or decorations of the church, or anything that has taken place since it was consecrated, a fair reason has been disclosed for any such apprehension. The probability of abuse, therefore, rests entirely on the character and position in the church of the thing itself": *Hughes* v. *Edwards*. (3)

The conclusion to which the Court then arrived was that

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(1) 1 P. D. 316; 2 P. D. 276.

(2) 2 P. D. 361, at pp. 367–8.

(3) 2 P. D. 361, at p. 369.

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the proposed erection was a fitting and natural architectural ornament to be placed in a part of the church where ornaments of the kind are not infrequently found, that it represented a group capable of artistic treatment, and only differed from the representation in the Exeter Reredos Case (*Phillpotts* v. *Boyd* (1)) in that the subject was the Crucifixion in the place of the Ascension, and that it differed not in essentials from other representations which had been found harmless, as, for example, that in St. Margaret's Church, Westminster, and accordingly that the illegality of the decoration was not established. It is not without interest to note that in the case last under consideration one of the arguments in support of the petition was that the case of a reredos was not like the case of a rood. "The crucifix and the rood have histories; the reredos has no history" (2): thus the argument is reported.

Important as these authorities are as guides, they are not conclusive of the particular question under consideration. I am not impressed by the argument that because the representation of the Crucifixion was held proper to be allowed as part of the architectural decoration of a reredos, it must therefore equally be allowed when differently treated and in a position notoriously associated in the past with ceremonial observances.

Another case upon which much reliance was placed in support of the petition was the decision of Sir Arthur Charles, Dean of the Arches, in *In re St. Anselm, Pinner.* (3) That was an application for a faculty to erect in the chapel of ease of St. Anselm, a modern building in Pinner, a chancel screen of oak with the figure of Our Lord on the Cross upon the centre of it, and the figure of the Virgin Mary on one side and St. John on the other. It was not intended that any of the figures should surmount the screen. It was proposed that they should be attached to the front of the upper portion of the tracery of the screen, which was so designed as almost entirely to fill the chancel arch, the central figure being placed immediately over the entrance archway, and the other two on the right and left at a somewhat less elevation upon pedestals or

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(1) L. R. 6 P. C. 435.

(2) *Hughes* v. *Edwards*, 2 P. D. 361, at p. 364.

(3) [1901] P. 202.

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stands forming part of the woodwork. The Chancellor of the Diocese of London refused a faculty on the grounds stated by Lord Penzance in the Arches Court in the case of *Clifton* v. *Ridsdale* (1), which were concurred in on appeal by the Judicial Committee of the Privy Council. (2) Upon appeal from the Chancellor's decision, Sir Arthur Charles, after observing upon the very different and antagonistic opinions as to the meaning of the judgment in *Clifton* v. *Ridsdale* (3) which had from time to time been expressed by the Diocesan Courts, stated as follows:—

". . . . I pass on to an examination of the case of *Clifton* v. *Ridsdale.* (4) There a large number of ecclesiastical offences were alleged against the defendant in the conduct of the services, with regard to some of which it should be noticed no defence was offered, and to which it is not necessary to refer in detail. The two charges which are directly relevant to the present inquiry were as follows: (1.) The erection on the top of the chancel screen of a crucifix and twenty-four metal candlesticks with candles in them which at the ordinary evening service were lighted upon either side, although the other lights in the church were amply sufficient; and (2.) the setting up on the walls of the church certain figures in coloured relief representing scenes of the Passion and forming what are commonly called 'Stations of the Cross,' such as are used in Roman Catholic churches, and partly relating to legendary scenes not part of the Gospel history, and tending as a whole to encourage ideas of an unauthorized and superstitious kind. As to this second article of charge, the learned judge received evidence which satisfied him that the 'Stations' were likely to be turned to superstitious uses. He accordingly ordered their removal, and from this part of his judgment there was no appeal to the Judicial Committee.

"With regard to the crucifix, after dismissing the suggestion made in the argument that the position of the candles and the manner in which they were lighted constituted a 'ceremonial'

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(1) 1 P. D. 316.

(2) *Clifton* v. *Ridsdale,* 1 P. D. 316; 2 P. D. 276.

(3) 2 P. D. 276.

(4) 1 P. D. 316; 2 P. D. 276.

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observance, he went on to consider whether a crucifix, 'placed and lighted' as this one was, was in danger of being an object of superstitious reverence. He lays stress on the fact that, like the 'rood' ordinarily found in parish churches before the Reformation, it was placed in high relief on the top of the middle portion of the screen, and also on the fact that when the candles were lighted it would stand out in a full light. He then refers to the destruction of crucifixes or roods as monuments of idolatry in the reign of Elizabeth, and to the circumstance that the worship of the rood was enjoined by the Sarum Missal in the order for service on Palm Sunday, and, proceeding upon these considerations, declared that the crucifix surmounting the screen in this case had not been shewn to his satisfaction to have been set up as an architectural decoration only, and that there did exist a danger of its being abused. He arrived at this conclusion both as to the Stations of the Cross and the crucifix, without regard to the manner in which the defendant was in the habit of conducting his services, although, he added, it was obvious enough the defendant's methods were such as largely to augment the probability of abuse. I ought not to omit to notice that, in criticizing the argument that the crucifix was merely intended to serve as an architectural decoration, the learned judge points out the distinction which exists between the crucifix alone and the crucifix associated with other figures and as embodying the scene of the Crucifixion. The Judicial Committee, upon appeal, affirmed this decision. But in giving the reasons for their judgment they drew special attention to the fact that the learned judge was 'dealing with a church in which was found not merely an illuminated crucifix, but also the Stations of the Cross, and other acts in the conduct of the services the illegality of which the defendant did not challenge in his appeal.' And they added that, whilst prepared under the circumstances of the case to affirm the order directing the removal of the crucifix, they thought it 'important to maintain as to representations of sacred persons and objects in a church the liberty established in *Phillpotts* v. *Boyd* (1), subject to the power and duty of the Ordinary so to exercise his judicial discretion in granting or refusing faculties as to guard against things likely to be abused for purposes of superstition.' These significant expressions seem to me to indicate plainly that their Lordships had no intention to decide, and did not decide, that a representation of the Crucifixion on a chancel screen could under no circumstances whatever be lawfully erected. I am unable, therefore, to agree with the construction placed by the learned judge of the Court below upon their decision. In my opinion, it leaves me free to consider whether, upon the principle laid down in *Phillpotts* v. *Boyd* (1), and emphatically approved in *Clifton* v. *Ridsdale* (2), the sculpture proposed to be erected in the present case is likely to be made the object of superstitious reverence, or whether it may properly be regarded as an architectural decoration and nothing more." (3)

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(1) L. R. 6 P. C. 435.

In the end Sir Arthur Charles considered that what was there proposed might properly be regarded as merely an architectural decoration, and allowed the faculty prayed for to issue. But it is very important to note that the learned judge was careful to observe that the position of the group the subject of his consideration, "though on the chancel screen, was by no means identical with the position occupied before the Reformation by the rood" (4); and, moreover, that there was nothing in the nature of the rood loft or rood beam. The elements which were wanting in the *Pinner Case* (5) are present here, and the fact, in my opinion, is of great importance in considering the question whether what is proposed to be erected is merely decorative or whether it will be likely to be abused. There is a passage in the judgment of Lord Penzance in *Clifton* v. *Ridsdale* (6) which has distinct application to the present case. The learned judge said this :—

"It is no doubt easy to say, What proof is there of danger of idolatry now? What facts are there to point to a probability of 'abuse'? But when the Court is dealing with a well-known sacred object—an object enjoined and put up by authority in all the churches of England before the Reformation, in a particular part of the church, and for the particular purpose of 'adoration'—when the Court finds that the same object, both in the church and out of it, is still worshipped by those who adhere to the unreformed Romish faith, and when it is told that now, after a lapse of 300 years, it is suddenly proposed to set up again this same object in the same part of the church as an architectural ornament only, it is hard not to distrust the uses to which it may come to be put, or escape the apprehension that what begins in 'decoration' may end in 'idolatry.' If this apprehension is a just and reasonable one, then there exists that likelihood and danger of 'superstitious reverence' which the Privy Council in *Phillpotts* v. *Boyd* (1) pronounced to be fatal to the lawfulness of all images and figures set up in a church." (2)

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(1) L. R. 6 P. C. 435.

(2) 2 P. D. 276.

(3) *In re St. Anselm, Pinner,* [1901] P. 202, at pp. 216–218.

(4) *In re St. Anselm, Pinner* [1901] P. 202, at p. 220.

(5) [1901] P. 202.

(6) 1 P. D. 316.

These observations of the learned judge were specially selected for approval by the Judicial Committee when *Clifton* v. *Ridsdale* (3) was under appeal, and their Lordships selected them as the grounds of the decision of the Court below which commended themselves to their judgment.

Now can I say that the rood in this case will be in no danger of receiving superstitious reverence? By "superstitious reverence" I do not mean actual worship of the image, which the Church of Rome does not enjoin, but, in the words of Lord Penzance in *Clifton* v. *Ridsdale* (4), "the far more extended conception of worship, adoration or reverence paid to the Deity in the presence of or before those objects or figures," including "all and every form or degree in which the object in question is made to take a place, or play a part in the devotions which are paid to the Deity before it." Nor do I confine myself to superstitious reverence which may be paid by clergy and congregation as part of the service, such as during processions or otherwise. I ought I think also to consider whether superstitious reverence in the sense I have explained will not probably be paid by individuals in private prayer before it or during public worship. I am asked to give the authority of this Court to the re-erection in the church of the exact thing which was formerly the subject of adoration in the same place—of the rood which, by Cromwell's Injunctions of 1536, was allowed to remain lighted, as were the Sacrament and the Sepulchre (3 Wilkins, Concilia, p. 816), was kept crowned, adorned, or veiled as the season might require, which, as we know from the Sarum Processionale of 1508, was a Station in procession every Sunday besides at other times, and was the subject of a special service on Palm Sunday. It is easy to say that the intellectual conditions of to-day are not those of the time when the rood in Paignton Church was the subject of daily reverence. Here again I may quote the words of Lord Penzance in *Clifton* v. *Ridsdale* (1): ". . . . but is it equally certain," he said, "that superstition has waned in proportion as the light of intellectual culture has advanced, and that the ground gained by the one has been lost by the other? Is it really so absurd, as it was argued to be, to imagine that in the present day the worship of lifeless images and figures, not as idols perhaps, but as aids to devotion, should again prevail as in old times? The fear that it should be so may be unfounded, but I question whether intellectual culture can be relied upon as a safeguard against it; for, if so, what is to be said of the Romish Church and of those able and distinguished men who, in our own day, have not hesitated to join it and accept its doctrines? What I am here discussing, I must again repeat, is not the belief in an idol of wood or stone, but the practice of involving in devotional exercises outward and visible forms as inculcated in the devotional books of the Roman Catholic creed. This is 'the fond thing vainly invented' of the 22nd Article of Religion; and the mere fact of the existence of such a doctrine in that Church, among whose members high intellectual power and acquirement is rife, is, to my mind, a conclusive answer to the suggestion that the intellect or knowledge of the present day may be relied upon to take the place of those safeguards which it was the work of the Reformation to establish. But another consideration must not be lost sight of. If the

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(1) L. R. 6 P. C. 435.

(2) *Clifton* v. *Ridsdale*, 1 P. D. 316, at p. 356.

(3) 1 P. D. 316; 2 P. D. 276.

(4) 1 P. D. 316, at pp. 352, 353.

(1) 1 P. D. 316, at pp. 356, 358.

intelligent and the cultivated no longer need the protection of old days, can the same be said of the weak and ignorant? The parish church is for all—not for a class; and if the crucifix placed as it is in this instance is lawful for St. Peter's Church, it is lawful for every parish church in the country, and may be provided for every congregation strong-minded or weak, instructed or ignorant. Let it be considered to what such a state of things as that would be likely to lead. If devotion to Our Lord comes to be habitually paid immediately before a sculptured figure of His Body on the Cross, which arrests the eye and occupies the imagination while the mind is in an attitude of prayer, it may be easy to some, and possible to many, but hardly possible to all, to wholly dissociate the outward object from the inward prayer, and exclude it from playing any part in that devotion. The immediate presence before the eye of an outward form or object proffers an assistance, though of a spurious kind, towards fixing wavering thoughts and exalting religious fervour, which can hardly be rejected by those who most feel the want of it and to whom all abstract thought is a difficult exercise. When there cease to be any such, the peril may cease also; but until then it is impossible, I think, to accept the alleged robust temper of the present times as a safeguard against so obvious a temptation."

The passage which I have quoted seems to me to be distinctly applicable to this case.

Amongst the reported decisions of the Diocesan Courts there is but one which is quite like this. I refer to the decision of the Chancellor of the Diocese of Norwich in the case of *The Vicar and Churchwardens of St. John the Baptist, Timberhill* v. *The Rectors, &c., of the Same.* (1) There a confirmatory faculty was refused for the retention of the rood on a beam above the rood loft then recently erected in an ancient church. It is true that in that case there was evidence that a special Palm Sunday service had been performed; but as the learned Chancellor observed in his judgment in the later case of *The Rector, &c., of Barsham* v. *The Parishioners of the*

(1) [1895] P. 71.

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Same (1), in giving his earlier decision he had held that to erect a rood now, after an interval of three centuries, of exactly the old pattern, in exactly the same place as before, and for no purpose arising out of the authorized services of the Church, was ipso facto likely to cause abuse. In the case I have last referred to, the Chancellor drew a distinction between it and the *St. John the Baptist, Timberhill, Case* (2); and although he admitted that it came rather near the line, he decreed a faculty. In the case of *St. Matthias, Richmond* (3), the then Chancellor of the Diocese of Rochester, Sir Lewis Dibdin, now Dean of the Arches, refused a faculty in a case similar to the *Barsham Case* (4), conceiving himself bound by the decision in *Clifton* v. *Ridsdale.* (5) In *The Vicar and Churchwardens of Great Bardfield* v. *All having Interest* (6) the Chancellor of the Diocese of St. Albans allowed the erection of the crucifix and the two figures under circumstances closely resembling those existing in the *Pinner Case.* (7)

After careful consideration of all the authorities, I hold that so much of the application as relates to the erection of the crucifix and the figures of the Virgin and St. John must be refused. If a faculty for them ought to be decreed, it must be allowed by a higher Court, and, having regard to the state of the authorities, I confess that I should be glad if, upon a review of my judgment, the principles of law applicable to this class of case could be more precisely and clearly established for our guidance.

But, if I am wrong in the conclusion to which I have arrived that the sculptured group in the proposed position would be an unlawful erection—in other words, if what is proposed is intended simply as a decorative or architectural addition, and is not objectionable in point of law—has the Court a discretion to refuse a faculty? It was strongly urged at the bar that the Court had no such discretion; but no attempt was made to distinguish in this respect an application for a faculty to erect a crucifix from other applications for a faculty, and indeed no such distinction is possible. To re-seat a church or to remove a gallery is lawful, yet the Court has discretion to refuse the faculty if under the circumstances of the case it deems it inexpedient, having regard to possible future requirements, to curtail the sitting accommodation in the Church, notwithstanding that the whole parish may support the application. In *Bradford* v. *Fry* (1) Lord Penzance, adopting the reasons of Dr. Lushington in *Beal* v. *Liddell* (2), decided that chancel gates were "objectionable." He did not declare them to be illegal, and in fact they never have been given that character, yet he refused to decree a faculty for them. If, therefore, the group in question be not unlawful, and the Court has a discretion, as I hold that it has, I must, in exercise of it, refuse to allow the re-erection in the church of the pre-Reformation rood group, which I deem to be neither necessary nor expedient.

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(1) [1896] P. 256, at p. 261.

(2) [1895] P. 71.

(3) *The Vicar of Richmond, &c.* v. *All Persons having Interest,* [1897] P. 70.

(4) [1896] P. 256.

(5) 2 P. D. 276.

(6) [1897] P. 185.

(7) *In re St. Anselm, Pinner* [1901] P. 202.

There is no difficulty as to the screen itself, but the proposed gates are not a matter of course. I have referred to the case of *Bradford* v. *Fry* (1), where it was held that gates were "objectionable," but they have been frequently allowed since that decision when circumstances made them necessary. Now it was proved at the hearing that the parish church of Paignton is open during the whole of every day, and that visitors come to the parish in thousands every year. The vicar stated that two years ago he detected a man in the act of breaking open the money-box in the church. In the chancel there is a valuable organ with an action of an exceptionally delicate character which very little would injure, and there are, of course, the service books of the choir and clergy and the ornaments of the Holy Table. The gates are desired for the protection of all these things. Upon the whole I think that a sufficient case has been made for their allowance. A faculty may issue for the inclosure and fitting of the north chapel as prayed, subject to the approval by the Court of the design for

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(1) (1878) 4 P. D. 93.

(2) Moore's Special Report.

1904

Paignton (Vicar of) v. All having Interest.

The Chancellor.

the Holy Table and of its arrangements. The pulpit and mural tablet may be moved to other positions as asked.

Before I part with this case I desire to say that since the hearing of the cause I have received a long letter from a parishioner protesting, on behalf of himself and others, against the proposed erection in the parish church of the crucifix and attendant figures. The writer has evidently not realized the fact that to address private communications to a judge, who can only proceed judicially and to the best of his understanding of the law, is improper. The letter is in the hands of the registrar, and I need scarcely say that in arriving at my decision I have in no way whatever been influenced by it. The citation in the cause was carefully framed to give clear notice of what the Court was prayed to grant, and I much regret that it was not obeyed by objectors who, by duly appearing and by their evidence given in a proper manner, might have rendered great assistance to the Court.

Solicitor for petitioners: *W. E. Tucker.*

C. F. J.

IN THE ESTATE OF DIANAH HUBBUCK.

1905
Feb. 27;
March 9.

Will—Latent Ambiguity—Gift to "my Grand-daughter"—Partial Blank—Parol Evidence—Grant of Probate.

Although a complete blank in a will cannot be filled up, a partial blank may be explained by extrinsic evidence.

Thus, where a testatrix appointed as executrix and legatee a person described in the will as "my grand-daughter ——," evidence was admitted for the purpose of explaining the latent ambiguity which arose from the fact that, at the date of the will and at the date of the death, the testatrix had three grand-daughters, and the will was thereupon pronounced for, and probate was granted to the one whom the Court found, from the extrinsic evidence, to be the person intended by the testatrix.

THE question before the Court in this case arose upon a will, which was in the following terms:—

"This is the last will and testament of me, Dianah Hubbuck, of 62, Alexandra Road, in the borough of Gateshead, in the county of Durham. I give devise and bequeath unto my grand-daughter   all my real and personal property of what nature or kind soever, and appoint her sole executrix of this my will, and hereby revoking all wills and testamentary dispositions by me heretofore made, I declare this to be my last will and testament this nineteenth day of September, one thousand nine hundred. Dianah Hubbuck."

There was a full attestation clause, the attesting witnesses being "George Forster, blacksmith, of 28, Lincoln Street, Gateshead-on-Tyne," and "Hannah Forster, 28, Lincoln Street."

The question thus raised for decision came before the Court in the form of a motion (for a grant of administration to himself) by Mr. William Bulmer Hubbuck, the father of a grand-daughter of the deceased and of two other children who were also grand-daughters of the deceased. According to the affidavit of the applicant, filed in support of the motion, the deceased Dianah Hubbuck died on June 29, 1904, leaving him her natural and lawful and only son and heir-at-law

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surviving, and the only person entitled to her estate in case of intestacy.

The real estate left by the deceased was estimated to be of the capital value of 400*l.* The personalty was said to amount to 152*l.* gross or 133*l.* net.

On application to the district registrar at Durham for a grant of probate to the said Mary Ann Hubbuck, or, in the alternative, that a grant of letters of administration with the said will annexed should be granted to William Bulmer Hubbuck, as the sole next of kin of the deceased, the matter was referred to the Court, and the parties agreed that it should be dealt with on motion.

Barnard, for the applicant. This will is void for uncertainty. The opposite party is going to ask the Court to add something —not merely to construe the will. *Hunt* v. *Hort* (1), which was the case of a gift by will to Lady ———, is similar to the present case. [He also relied on *Charter* v. *Charter*. (2)]

R. M. Middleton, for the grand-daughter. Mary Ann Hubbuck is sufficiently indicated in the will. The argument on the other side is, in effect, that there is no will. The word "grand-daughter" in the will makes all the difference between this case and the authorities cited on the other side, which are relied on by us as shewing what a blank is, namely, a *complete* absence of description. This, it is submitted, is rather a case of a partial blank or omission. In the judgment in the case of *In the Goods of de Rosaz* (3) Sir James Hannen, after pointing out that a complete blank cannot be filled up by parol evidence, however strong, distinctly laid down that if there are in the will any words to which a reasonable meaning may be attached, parol evidence may be resorted to for the purpose of shewing what the meaning is. Even in *Charter* v. *Charter* (2), cited on the other side, facts similar to those in the present case are indicated in the judgments. The Lord Chancellor (Lord Cairns), in the early part of his judgment (4) pointed out that the only case in which evidence of the kind now

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(1) (1791) 3 Bro. C. C. 311.

(2) (1874) L. R. 7 H. L. 364, at p. 383.

(3) (1877) 2 P. D. 66, at p. 69.

(4) L. R. 7 H. L. at p. 377.

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tendered could be received "is where the description of the legatee, or of the thing bequeathed, is equally applicable in all its parts to two persons, or to two things."

So far as this Court knows, there is only one grand-daughter of the testatrix, unless and until evidence is received to shew that there are more.

[THE PRESIDENT referred to *In re Stephenson, Donaldson* v. *Bamber* (1), where a gift to "the children of the deceased son (named Bamber) of my father's sister share and share alike" was held void for uncertainty, there being, to the knowledge of the testator, three deceased sons of the sister of the testator's father, all named Bamber; but there does not appear to have been evidence that the testator meant any one of those three sons rather than the other.]

The guiding principle is that equivocation lets in parol evidence: *Doe* v. *Hiscocks* (2) (judgment of Lord Abinger); *Gord* v. *Needs*. (3)

Declarations of the deceased after the date of the will were admitted in *Doe* d. *Allen* v. *Allen* (4) (judgment of Lord Denman).

The Court takes no notice of a blank; it is merely a piece of uncovered paper.

The only reported case exactly in point is *Phelan* v. *Slattery* (5), where the bequest was "to my nephew," and evidence of declarations was admitted to shew what person was intended.

Barnard, in reply.

Cur. adv. vult.

March 9. SIR GORELL BARNES, PRESIDENT. This is a motion by William Bulmer Hubbuck, the father of three grand-daughters of the deceased, for a grant of letters of administration to himself of the estate of the deceased. The applicant, in his affidavit, sets out his interest as the only son and heir-at-law of the deceased, and he also states the nature and value of the estate. It is clear that there are three grand-daughters, the

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(1) [1897] 1 Ch. 75.

(2) (1839) 5 M. & W. 363; 52 R. R. 748.

(3) (1836) 2 M. & W. 129; 46 R. R. 521.

(4) (1840) 12 A. & E. 451; 54 R. R. 603.

(5) (1887) 19 L. R. (Ir.) 177.

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The President.

eldest being Miss Mary Ann Hubbuck, and the other two being, one a married woman, and the other a child of eleven years of age. The point made by him on this motion is that, on the face of the will, there was a gift which was void on the ground of uncertainty; and, that being so, that the will became inoperative, and that Mr. Hubbuck was entitled to take the property as next of kin and heir-at-law, and was entitled to a grant of letters of administration with the will annexed. On the other hand, Mr. Middleton contended that the will was operative, and that it devised and bequeathed the real and personal estate of the deceased to his client, Miss Mary Ann Hubbuck, who was, he contended, sufficiently designated by the description, "my grand-daughter," and therefore was entitled to take under the will. The point made by the applicant was that there was a blank in the will after the word "grand-daughter," which was obviously intended to have a name filled in, and that, as that name had not been filled in, the will became inoperative, because the words "my grand-daughter" left the disposition an uncertainty where there are three grand-daughters, as there were in fact at the time of the death of the testatrix, or rather at the date of the will, and who are still living, and that therefore the will was inoperative on the ground of uncertainty. I do not think that there is any difficulty in the law applicable to this case. The question really comes to be whether the Court is entitled, in any circumstances, to admit evidence of the intention of the testatrix, so as to ascertain who is meant by the words "my grand-daughter," notwithstanding the fact that there is a blank following those words, which, it is fairly obvious, was intended to be filled in.

The question of law which is thus raised is a very old one indeed, and has been repeatedly the subject of statements by different Courts. I only propose to refer to one or two cases which shew how clearly the matter has been expressed in former times. In Bacon's Maxims of Law, rule 23, there is a very clear statement on the subject: "Ambiguitas verborum latens verificatione suppletur; nam quod ex facto oritur ambiguum verificatione facti tollitur."

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The case of *Doe* v. *Hiscocks* (1) contains, in the course of the judgment given by Lord Abinger, this passage, which is directly in point in the present case: "Now, there is one case in which it appears to us that this sort of evidence can properly be admitted, and that is where the meaning of the testator's words is neither ambiguous nor obscure and where the devise is on the face of it perfect and intelligible, but from some of the circumstances admitted in proof an ambiguity arises as to which of the two or more things or which of the two or more persons, each answering the words in the will, the testator intended to express." And then, again, the judgment of the late Lord Hannen in the case of *In the Goods of de Rosaz* (2) deals very fully with the subject, and, in course of his judgment, refers to two cases which were relied on by Mr. Barnard, and I think the statement in regard to those cases sufficiently shews the distinction between them and the present case. He said this: "The whole of the testator's will must be in writing, and the Court is therefore confined to putting an interpretation on words actually used by him; or, as the rule is expressed by Sir J. Wigram: 'The judgment of a Court in expounding a will should be simply declaratory of what is in the instrument.' In considering, therefore, whether a particular person or thing has been sufficiently indicated by a testator, there must be some words to which the required meaning may be attached. A complete blank cannot be filled up by parol testimony, however strong." The words "complete blank" are the words which distinguish that case from the present case. Then he proceeds: "Thus, a legacy to Mr. —— cannot have any effect given to it: *Baylis* v. *Attorney-General* (3), nor a legacy to Lady ——: *Hunt* v. *Hort*. (4) But if there are any words to which a reasonable meaning may be attached, parol evidence may be resorted to, to shew what that meaning is. Thus, a legacy to a person described by an initial, as to Mrs. C., admits of explanation as by shewing that the testator was accustomed to speak of a particular person by the initial of her name." And

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(1) 5 M. & W. 363; 52 R. R. 748.

(2) 2 P. D. 66.

(3) (1741) 2 Atk. 239.

(4) 3 Bro. C. C. 311.

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The President.

he refers to *Abbot* v. *Massie* (1) and *Clayton* v. *Lord Nugent*. (2) "And where a blank was left for the Christian name, parol evidence has been admitted to shew who was intended." Then again he says (3): "I have dealt with the case thus far on the supposition that evidence of testator's declarations of intention are not admissible. In the case of *Charter* v. *Charter* (4) the Lord Chancellor (Lord Cairns) says: 'The only case in which evidence of this kind can be received is where the description of the legatee, or of the thing bequeathed, is equally applicable in all its parts to two persons or two things.' Sir J. Wigram states the proposition thus (prop. 7, par. 194): 'The only cases in which evidence to prove intention is admissible are those in which the description in the will is unambiguous in its application to each of several subjects.' If these expositions of the law are to be taken without any qualification, evidence of the testator's expressed intention could not be given in this case, for there is here only one known subject to which the testator's language can apply." Now, as I have said, this subject is to my mind perfectly plain, and the law on it not in doubt.

The only question is whether there is a description of a person which can fit two or more persons, and whether when that is the case evidence of intention to apply that description to one particular person may be given. The cases which I have referred to in the whole of the books on the subject make this point absolutely clear on the line which I have indicated from the judgments to which I have referred; and the only question seems to me to be a question on this particular will, whether there is a description of a person intended to be benefited, which is applicable to two persons or more, so as to let in evidence to shew which of those persons it was the intention of the testatrix to benefit.

Now, Mr. Barnard argued this case as if the whole matter depended on the blank. He was, I think, right to concede that if the words "all my real and personal estate" had followed immediately on the words "my grand-daughter," it would have been exceedingly difficult to contend in favour of his client; and the only ground on which he sought to bring this case outside the general propositions I have referred to was that there was a blank, and that there were those cases I have referred to which shewed that a total blank cannot be filled up. But the distinction is that, in this case, it is not a total blank. The will, so far as it is necessary to consider it, contains a description which fits three people. The description is: "unto my grand-daughter," and it is perfectly clear, I think, that if there was only one grand-daughter living at the time of the will, and living afterwards so as she could take, that grand-daughter could be identified.

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(1) (1796) 3 Ves. 148; 3 R. R. 79.

(2) (1844) 13 M. & W. 200, 207; 67 R. R. 560, 566.

(3) 2 P. D. at p. 70.

(4) L. R. 7 H. L. at p. 377.

But there turned out to be three grand-daughters when the facts are looked into; and the only question is whether the evidence sufficiently identifies which grand-daughter is meant. I have, therefore, proceeding on the principles which I have just discussed, thought that the evidence which has been filed in this case was admissible, and it was agreed that if I thought it was admissible I should read it. I have read it, and there is not the slightest doubt, when that evidence is read, that the grand-daughter whom Mr. Middleton represents was the person intended by the testatrix to be benefited. Mr. Forster, who made the will, says that he knew the testatrix for many years, and in the early part of September, 1900, she informed him that she wished to make her will, and to leave everything to her grand-daughter "Polly," and to appoint her sole executrix, and that the testatrix brought him her late husband's will as a guide. Mr. Forster thereupon drew the will, which was executed by the testatrix; both he and his wife attested it; and Mr. Forster adds that he had known Mary Ann Hubbuck, the testatrix's grand-daughter, for many years, and knew she was always called "Polly." He says, further, that she always treated her grandmother, the testatrix, with great kindness, and that he always understood that she contributed to the support of the deceased. Then he refers to the two sisters, and that evidence is supported by other witnesses who shew that this girl was always called "Polly," and I have no doubt myself—not the slightest doubt—that this testatrix intended that the grand-daughter Polly was the person to be benefited, and that she wished to appoint her as executrix, and that therefore she is the person entitled to take probate of this will.

Under those circumstances, the motion must be rejected, and the will admitted to probate by the executrix appointed under it. There is only one little point of form—or I suppose it might be substance—and that is that the only parties before me on the motion are the father and this daughter. The two other daughters are minors and would not be bound by this decision; but the case seems so clear against them that I do not know whether the parties would prefer to take the risk of that.

R. M. Middleton. We are satisfied to take the grant and the risk.

THE PRESIDENT. I only decide between you two. As to the costs, I think it reasonable that they should come out of the estate.

Solicitors: *King, Wigg & Co., for Watson, Burton & Corder, Newcastle-on-Tyne; Gribble, Oddie, Sinclair & Johnson.*

H. D. G.

IN THE ESTATE OF SARAH EGGAR FROGLEY.

1905
March 13.

Will—Construction—"Children belonging to me"—Illegitimate Child—Distinction between Will of Mother and Will of Father of Illegitimate Child or Children—Probate granted to Illegitimate Child born after date of Will.

A distinction is to be drawn between benefits conferred by deed or will upon future illegitimate children, according to whether the person purporting to confer the benefit is the mother or the father.

A spinster made a will in 1876 by which she purported to leave her property in trust for all the children who might belong to her at the date of her death. In 1878 she gave birth to an illegitimate child, who survived her:—

Held, that the child was entitled to take under the will.

THIS case raised a point of construction, which came before the Court on a motion for a grant of letters of administration with the will annexed.

The will was dated June 9, 1876, and by it the testatrix left all her property to her sister, Jane Frogley, in trust for all the children who might "belong to" her (the testatrix) at the time of her death, to be equally divided between them, share and share alike, to and for their own sole use and benefit, and if there should be only one child "belonging to" her at the time of her decease, then for the sole use and benefit of that child. And, in the event of there being no child or children "belonging to" her at the date of her death, the testatrix left all her property to her sister, the said Jane Frogley, absolutely; and she appointed the said Jane Frogley sole executrix.

In 1878, about two years after the date of the will, the testatrix gave birth to an illegitimate daughter, who married and survived her.

Jane Frogley died in 1902; and the testatrix died on January 2, 1905, a spinster, without lawful parent, grandparent, brother or sister.

Samuel Eggar and Mrs. Jane David, the brother and sister of the testatrix's mother, were stated to be the only next of kin of the testatrix; and the said Samuel Eggar now applied for a grant of administration with the will annexed, on the ground that the residuary gift in the will was void.

The estate was said to consist of a mortgage and interest thereon, together amounting to 768*l.* 1*s.* 10*d.*, and wearing apparel and furniture of the nominal value of 10*l.*

Charles Stimson, for the applicant.

Le Bas, for the illegitimate daughter. Illegitimate children do "belong to" their mother. The testatrix must be presumed to have known the law. Most of the reported cases arose where there was uncertainty as to who was meant to be benefited by the testator. Here, there is no question of uncertainty. There may be uncertainty as to the father, but there can be none as to the mother of an illegitimate child. *Clifton* v. *Goodbun* (1) is like the present case, save for the fact that the children were specifically named in a codicil, which was treated by Sir John Stuart V.-C. merely as evidence of who was meant. Here, there can be no question as to whom the testatrix intended to benefit.

[BARGRAVE DEANE J. The words used in the present will are sufficiently wide to cover an adopted child.]

Le Bas also referred to *Wilkinson* v. *Adam* (2), and contended that his client's case came directly within the principle laid down in *Occleston* v. *Fullalove*. (3)

Charles Stimson, in reply. It is against the policy of the law to allow a person to make provision for a future illegitimate child: *Hill* v. *Crook* (4); *In re Lowe, Danily* v. *Platt*. (5) It is right to point out that the contrary view was taken by the majority of the Court in *Occleston* v. *Fullalove* (3), which does not appear to have been cited in the case of *In re Lowe* (5), but which was followed by Stirling J. in *In re Hastie's Trusts*. (6)

BARGRAVE DEANE J. I am of opinion that the grant should go to the illegitimate daughter of the testatrix. In my view,

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(1) (1868) L. R. 6 Eq. 278.

(2) (1812–13) 1 Ves. & B. 422, 462; 12 R. R. 255; 14 R. R. Preface, X.

(3) (1874) L. R. 9 Ch. 147.

(4) (1873) L. R. 6 H. L. 265, at p. 278.

(5) (1892) 61 L. J. (Ch.) 415.

(6) (1887) 35 Ch. D. 728.

1905

FROGLEY, IN THE ESTATE OF.

Bargrave Deane J.

there is a great distinction to be drawn between gifts, whether by deed or will, by a man in favour of illegitimate children and gifts by the mother of an illegitimate child or children. It may well be urged that, in the former case, there is an immoral consideration; but I cannot see that such an argument applies in the case of gifts by the mother. It seems to me, in the conflict of authority brought to my notice in the course of the arguments, that gifts by a mother are not affected by that policy of the law. I do not propose to go through the different cases which have been cited. I can quite understand those cases affecting the minds of the different judges, and I think that the case before North J. was decided as it was through the accident that the decision in *Occleston* v. *Fullalove* (1) was not brought to that judge's notice. Therefore, as the child in the present case did undoubtedly "belong to" the testatrix, that child is the person she intended to benefit, and there is nothing in the policy of the law to affect this gift. The grant will, therefore, go to Gertrude Smith, and my order to this effect will include a declaration that, on the true construction of this will, the said Gertrude Smith being the only child belonging to Sarah Eggar Frogley, the testatrix, at the date of the death of the said Sarah Eggar Frogley, is entitled to the property passing under the will. I think it reasonable that the costs of both parties should come out of the estate.

Solicitor: *W. Montgomery White.*

H. D. G.

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(1) L. R. 9 Ch. 147.

1905
April 3.

IN THE ESTATE OF FREDERICK GEORGE FROST.

Administration—Grant—Citation—Practice—21 *Hen.* 8, *c.* 5—*Widow passed over on Ground of Marital Misconduct.*

On an application for a grant of administration to the son of an intestate, passing over the widow on the ground of marital misconduct, which had been established in a suit by the intestate, the Court made the grant to the son without requiring the widow to be cited.

In the Goods of Middleton, (1888) 14 P. D. 23, distinguished.

MOTION for administration, without citing the widow of the intestate.

Frederick George Frost, late of 81, Dean Street, Soho, in the county of London, died on September 28, 1904, intestate.

In 1883 he was married to Clara Maud Gibson, but they separated in 1889 by mutual consent.

On January 11, 1896, the said Frederick George Frost obtained a decree nisi for the dissolution of his marriage; but this decree was rescinded and the petition dismissed on the ground that the petitioner had committed adultery.

The said Clara Maud Frost was last heard of in the year 1895, when she was living at an address in Southwark; but inquiries made at that place had not resulted in tracing her.

The intestate left a son and daughter his sole next of kin, the former being also his heir-at-law.

The estate consisted of personalty of the net value of about 473*l.*

Bayford, for the son, moved for a grant of administration, passing over the widow. The Statute of Henry VIII. (1), which gives the widow a title to the grant, only places her on an equal footing with the next of kin, though, no doubt, a practice has grown up of giving the grant to the widow unless good cause be shewn to the contrary. In the case of *In the Goods of Nares* (1) the widow was passed over after a decree of divorce in India.

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(1) 21 Hen. 8, c. 5, s. 2, is as follows: "And in case any pson dye intestate, or that the executours named in any such testamentes refuse to prove the said testament, then the said ordynary, or other person or persons havyng auctoritie to take probate of testamentes as is above said, shall graunt the administracion of the goodes of the testatour or person disseased to the wydowe or to the next of his kyn or to both, as by the discrecion of the same ordynary shalbe thought good. . . . ."

[BARGRAVE DEANE J. Because she had ceased to be the wife of the deceased.]

In the case of *In the Goods of Middleton* (2), the widow was ordered to be cited; but that case is distinguishable, because there had been no opportunity of answering the charges made against the widow, whereas, in the present case, the charge of adultery was proved against her. That, it is submitted, is sufficient ground for passing her over.

BARGRAVE DEANE J. I think I can accede to this application. The grant may go to the son, without citing the widow; but the sureties to the administration bond must justify in respect of the share of the estate to which the widow may be entitled, in order that her interest in the estate may be absolutely protected.

Solicitor: *J. Howard Smith.*

(1) (1888) 13 P. D. 35.

(2) 14 P. D. 23.

H. D. G.

1905
March 3, 6, 9, 10.

ROCHE *v.* ROCHE (THE KING'S PROCTOR SHEWING CAUSE).

Divorce—Wife's Petition—Adultery of Petitioner brought about under Duress and by Coercion of the Husband—Material Fact—Suppression—Refusal of Decree.

If a petitioner withholds from the Court, on the hearing of a petition for dissolution of marriage, the fact that she has committed adultery, such withholding of a fact is of itself a ground for refusing to make the decree absolute, even though the adultery is found, on a full investigation of all the facts of the case, to be such as would warrant the Court in granting the petitioner relief, and though had the facts been fully disclosed to the Court in the first instance it would, in the exercise of its discretion, have granted relief.

THIS was the trial of an intervention by the King's Proctor.

The petitioner (wife) was married to the respondent in 1891, and on July 31, 1903, she filed her petition for divorce on the grounds of cruelty and adultery.

The suit was undefended, and a decree nisi was pronounced. The cruelty proved was in April and May, 1899, and the adultery in June and July, 1901, with a woman named in a letter sent by the respondent to the wife's father towards the end of 1902.

In the course of her evidence on the hearing of the petition the petitioner stated, in answer to the learned judge, that after she left her husband in 1899 on account of his cruelty she had never seen him or heard of him until he wrote to her father in December, 1902.

On October 3, 1904, the King's Proctor filed his plea, alleging that material facts had not been brought to the knowledge of the Court, and by his particulars he limited such material facts to the matters alleged in the subsequent paragraphs of his plea, namely, a confession of adultery signed by the petitioner in December, 1897, the adultery being with a man named and extending over the years 1895, 1896, and 1897; that in 1901 the respondent had given instructions for filing a petition for dissolution of marriage against the petitioner, which was not, however, proceeded with; and condonation of the respondent's adultery on three specific occasions in February, 1902, when it was alleged that the petitioner had marital intercourse with the respondent at a place named.

The petitioner, in her answer to the King's Proctor's plea, denied the alleged condonation, and pleaded that her adultery (if any) was committed with the connivance, at the instigation, and under the duress of her husband, and that the confession (if any) was made at his instigation and under his duress.

The case on the King's Proctor's intervention was tried before the Court and a jury.

The respondent gave evidence in support of the King's Proctor's case, and other witnesses were also called on his behalf.

The petitioner and two witnesses on her behalf were called in defence, and in the course of her evidence the petitioner stated (inter alia) that she did not disclose her now admitted adultery, either to her solicitors or to the Court, because she was so ashamed of the whole business, which had absolutely ceased since about the middle of November, 1897, and which had been condoned by subsequent cohabitation, and she had since endeavoured to efface it from her memory; and, under all the circumstances, she did not know when she gave her evidence on March 8, 1904, that it was material. She further stated that she had in April, 1902, written to her husband a letter, which was produced by the King's Proctor, and that she stated in that letter that she would not defend any suit he might bring against her, her reason for this being that he was continually molesting her, and that she would have been glad to be free from him.

The learned judge, having summed up, left to the jury the following questions:—

1. Did the petitioner condone the adultery of the respondent?

2. Did the petitioner commit adultery with the man named in the confession?

3. Was the petitioner's adultery, and was her written confession of that adultery, brought about by the respondent's coercion?

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ROCHE v. ROCHE.

If not satisfied as to coercion:—

4. Was the petitioner's adultery committed with the consent and knowledge of the respondent?

5. Did the petitioner intentionally keep those facts from the Court at the former hearing?

The jury answered the first question in the negative; the second and fourth questions, that the petitioner committed the adultery with the knowledge and consent and (question 3) under the coercion of the respondent. The fifth question the jury answered in the affirmative.

March 10. *Guy Stephenson* (*C. Mathews* with him), submitted that upon those findings the Court should rescind the decree on the ground of wilful suppression of material facts. This is not a case for the discretion of the Court. The result of the cases, such as *Morgan* v. *Morgan and Porter* (1), *Symons* v. *Symons* (2), and *Constantinidi* v. *Constantinidi and Lance* (3), appears to be that each case must be dealt with on its merits, and that no general rule prevails. Here, there has been wilful and intentional suppression of a material fact, namely, the adultery of the petitioner. There is no reported case where the Court, having been wilfully deceived by a petitioner, has exercised its discretion in his or her favour. The petitioner, at the hearing of her petition, presented a case entirely different from that now presented, and she gave to the learned judge who tried that case answers which she knew to be untrue. *Wyke* v. *Wyke* (4) is a recent authority for saying that the Court will not relieve a petitioner from the consequences of adultery simply on the ground that such adultery was more or less pardonable or excusable.

Durley Grazebrook, for the petitioner. The only cases in which suppression of a material fact has been held fatal are those where that fact, if disclosed in the first instance, would have been an absolute bar, as, for example, collusion.

[BARGRAVE DEANE J. referred to *Butler* v. *Butler*. (5)]

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(1) (1869) L. R. 1 P. & M. 644.

(2) [1897] P. 167.

(3) [1903] P. 246.

(4) [1904] P. 149.

(5) (1890) 15 P. D. 66.

That case is an illustration. It was a case of the most flagrant collusion. The most that can be said against Mrs. Roche is that, knowing the fact of her adultery, but not knowing the law, she concealed a fact which now, on full investigation, turns out to be, in law, no adultery, or at least such adultery as is not materially to her prejudice, on the authority of the cases, such, for instance, as *Gower* v. *Gower* (1) and *Picken* v. *Picken.* (2) The reasons now urged against the petitioner are really new to the King's Proctor's case, and were not put forward as material facts in his plea or particulars, by which he should be held bound. Those reasons are now specially urged as being the incorrect answers given to the learned judge who tried the first case. But, surely, the excuse now given should be accepted, assuming that this point is open to the King's Proctor. The facts which were not disclosed, but which were excused, in *Burdon* v. *Burdon* (3) were far more to the petitioner's prejudice than anything now before the Court. The petitioner in that case was found, on the intervention, to have lived and cohabited with a man for some three years and at a time when there was no suggestion of duress or interference on the husband's part. That was in addition to and apart from the adultery which had been brought about with other men through the husband's duress. Here, there is only one man, and the adultery was brought about by duress, as proved to the satisfaction of the jury. If the facts now proved had been before the Court at the hearing of the petitioner's suit, can it be doubted for a moment that the Court would have exercised its discretion in the petitioner's favour? *Burdon* v. *Burdon* (3) is an authority for the proposition that the Court will deal with the matter now as if it were the original hearing. [He also referred to *Moore* v. *Moore* (4) on the question of bona fides.]

Guy Stephenson, in reply. This is not the original hearing, and that makes all the difference. The temptation to a petitioner to take the risk of non-disclosure will be greatly increased if the decree is allowed to stand in a case of so little merit as the present, where there has been a persistent course of adultery extending over several years. In *Burdon* v. *Burdon* (1) the learned judge expressly found that the petitioner's former solicitor, and not the petitioner herself, was to blame for the suppression. That distinguishes that case from the present one, where neither the petitioner's counsel nor her solicitors were informed of the facts now disclosed. [He also referred to the judgments of Lindley L.J. and Lopes L.J. in *Butler* v. *Butler*. (2)]

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(1) (1872) L. R. 2 P. & M. 428.

(2) (1864) 34 L. J. (P. & M.) 22.

(3) [1901] P. 52.

(4) [1892] P. 382.

BARGRAVE DEANE J. The difficulty I feel in this case is to sever my feelings of sympathy from my duty as a judge. I confess all my sympathy is with the petitioner, Mrs. Roche, on the point that she has been a very ill-used woman. I fully accept the verdict of the jury and think it is quite justified: that the adultery in question—for whatever you may say about it, it was adultery in fact—was brought about by the husband's coercion and threats and violence. But I have to administer the law. The law imposes upon me the exercise of a discretion, and the Act of Parliament is pretty clear as to the points upon which that discretion has to be exercised. The Act says—and the words are material—that the King's Proctor's intervention may be on the ground of collusion, or, in the alternative, suppression of material facts. It is not necessary that the suppression of material facts should be such as in the case of *Butler* v. *Butler*. (2) If a petitioner suppresses facts, that is within the Act of Parliament, even though the parties may not be in collusion. The King's Proctor is a public official whose duty it is to ascertain whether a petitioner has been acting in collusion with her husband, or whether she has suppressed a material fact. Undoubtedly adultery on the part of a petitioner is a material fact, because it is one of the things mentioned in the original Divorce Act as being a matter which the Court is to take into account in deciding whether a dissolution of marriage shall be pronounced in favour of a petitioner who has committed adultery. Well, then, was it the duty of this petitioner to bring the fact of her adultery before the Court

(1) [1901] P. 52.

(2) 15 P. D. 66.

herself, or was she justified in leaving it out on the chance that it would not be found out, and meeting it only if the King's Proctor, or any other person who might be entitled to intervene, should come in and prove it? I confess that it seems to me a very serious suggestion that the words "suppression of material facts" should not be taken to be pretty well on the same basis, by way of strength, as collusion. The Act of Parliament puts them together as alternative matters which are material.

The difficulty I have is this: If the facts had been brought before me—if I had been sitting here in the place of Barnes J. when this original petition was heard, and if this story of the wife's adultery and the coercion which brought it about had been put before me, and the matter argued as it has now been argued, I should have had no hesitation in saying that this woman had brought before the Court this material fact, that she had not attempted to deceive the Court, and, therefore, that the Court, in its discretion, would have granted her relief. But I do not feel in the same position at all when I find that she has attempted to deceive the Court; and, as I say, with all the sympathy which I have for her, and which is real, I am bound to say that, by the suppression of this material fact, and the deception of the Court—the intentional deception which the jury have found—she has not come before the Court in a way in which the judge should exercise his discretion in her favour. I think that the King's Proctor is not to be put into the position in which he is to be made, as it were, a detective. The parties have to put before the Court all material facts, and it is their duty to do it; and my strong opinion is that in no case where material facts have been intentionally kept from the Court ought a decree to be made absolute. That is my reading of the Act of Parliament, and although I think that, if these material facts had been originally brought before the Court, the Court might and probably would have exercised its discretion in favour of this petitioner, the matter is not to be treated upon the same basis, if it is brought before the Court only upon the intervention of the King's Proctor.

Upon these grounds I must rescind the decree nisi and dismiss the petition.

Guy Stephenson. The King's Proctor does not ask for costs.

BARGRAVE DEANE J. I should not grant costs in this case, if the King's Proctor had asked for them. The petition is dismissed, but without any order for costs.

Solicitors: *The King's Proctor; Rose-Innes, Son & Crick.*

H. D. G.

C. A.
1905
March 8.

[IN THE COURT OF APPEAL.]

THE TOSCANA.

Admiralty—Salvage—Appeal—Practice—Reduction of Award—Apportionment—Costs.

On appeal in a salvage suit, the defendants succeeded in substantially reducing the award, namely, from 5100*l.* to 3000*l.* :—

Held, by the Court of Appeal (Collins M.R., Mathew and Cozens-Hardy L.JJ.), that in such cases the ordinary rule in the Court of Appeal, that a successful appellant is entitled to the costs of the appeal, would prevail, notwithstanding the general rule to the contrary laid down in *The Gipsy Queen*, [1895] P. 176, based on the earlier practice of the Privy Council when exercising jurisdiction in Admiralty cases.

APPEAL by defendants, the owners of the *Toscana*, her cargo, and freight, against an award of Sir F. H. Jeune, President, in a salvage action brought by the plaintiffs, the owners, master, and crew of the *Bonny*.

The case is reported only on the question of the practice as to apportionment and costs.

The *Toscana*, a screw steamship of 4252 tons gross and 2748 tons net register, 363 feet long, with engines of 325 horse power nominal, belonging to the Societa di Navigazione a Vapore "Italia," and manned by a crew of 84 hands, six days out from Genoa for Buenos Ayres, with general cargo, 13 saloon and 1160 steerage passengers, became disabled, by the breaking of her propeller-shaft, about 7 P.M. on December 11, 1903, in the North Atlantic, in about lat. 25° 22′ N. and

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long. 16° W. As a result of the accident, the stern-tube was fractured, and the vessel made some water, but this ceased on the tube being successfully caulked and cemented and the propeller secured. Early on the morning of the 12th she was sighted, flying signals of distress, and having drifted with a moderate north-easterly breeze some 26 miles to the south-west, by the *Bonny*, a steel screw mail steamer, running in the British and African Steam Navigation Company's line, of 2702 tons gross and 1713 tons net register, 327 feet long, with engines of 240 horse power nominal working up to 1200 indicated, and at the time on a voyage from Liverpool to Sierra Leone on the West Coast of Africa with four passengers, mails, and general cargo, manned by a crew of 39 hands all told.

The *Bonny* took the *Toscana* in tow and, at 8 A.M., on December 14, the two vessels reached Las Palmas roadstead, Grand Canary, in safety, after a towage back of 195 miles in 52 hours in fine weather, the total delay to the *Bonny* being 73 hours, and the expenses incurred amounting to 13*l*. 10*s*. 6*d*.

The values were: *Toscana* 50,000*l*., cargo 36,000*l*., freight 1437*l*.—total 87,437*l*.; *Bonny* 28,000*l*., cargo 40,688*l*., no freight at risk—total 68,688*l*. Bail was applied for by the plaintiffs and given by the owners of the *Toscana* in the sum of 4000*l*.

On April 14, 1904, the case came before Sir F. H. Jeune, President, assisted by two of the Elder Brethren of the Trinity House, and the learned judge awarded the plaintiffs the sum of 5100*l*. with costs, apportioning that sum as follows: to the owners of the *Bonny* 3900*l*., to the master 400*l*., to the crew 800*l*., according to their rating, but following *The Spree* (1) in respect of the non-navigating portion of the crew—to the surgeon, purser, stewards, baker, butcher, and cooks, according to one-half of their actual rating.

On appeal:—

1905. March 8. *Pickford, K.C.*, *Laing, K.C.*, and *Arthur Pritchard*, for the appellants (defendants), owners of the *Toscana*, her cargo and freight, contended that the award amounting to nearly 6 per cent. of the total value of the salved vessel, her cargo and freight, was, in the circumstances, and as compared with awards made in somewhat analogous cases, so greatly in excess as to be unjust to the owners of the Italian ship, considering the simple character of the services rendered, the absence of imminent risk to either life or property, the open water in which the *Toscana* was drifting, the fine weather, and the probability of being picked up. On the question of the grounds for increasing or reducing an award the cases of *The City of Chester* (1) and *The Accomac* (2) were cited.

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(1) [1893] P. 147.

Aspinall, K.C., and *A. D. Bateson*, for the respondents (plaintiffs), the owners, master, and crew of the *Bonny*.

THE COURT (Collins M.R., Mathew and Cozens-Hardy L.JJ.), after consultation with the assessors on the nautical questions involved, reduced the award to 3000*l.*, mainly on the ground that, though the values were large, special or exceptional risk arising from stress of weather, or serious loss arising from delay to the salvor, or the probability of provisions running short on board the salved vessel, were wanting in this case, and the Court apportioned the sum awarded amongst the owners, master, and crew of the *Bonny* in similar proportions to those awarded in the Court below.

On the question of costs:—

Aspinall, K.C., for the respondents, submitted, on the authority of *The Gipsy Queen* (3), and of the five cases in the Privy Council cited in a note at p. 178 to that case, that an appellant succeeding in reducing the amount of the salvage award is not entitled to costs.

Pickford, K.C., contra. In *The Prince Llewellyn* (4), following *The Kilmaho* (5), it was held by a Divisional Court, sitting in Admiralty, that where an appellant succeeds in considerably reducing the award the costs of the appeal will be allowed.

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(1) (1884) 9 P. D. 182.
(2) [1891] P. 349.
(3) [1895] P. 176.
(4) [1904] P. 83.
(5) (1900) 16 Times L. R. 155.

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Collins M.R. We think that we are at liberty to follow the ordinary rule that prevails in this Court, for the general rule which was laid down by the Privy Council when exercising jurisdiction in Admiralty cases, and which was followed in *The Gipsy Queen* (1), seems to have been relaxed in this Court in *The Kilmaho* (2), and in the Divisional Court sitting in Admiralty in *The Prince Llewellyn.* (3) Therefore, as the appellants have succeeded in reducing the award by a very substantial amount, we are of opinion that they ought to have their costs of the appeal, the costs in the Court below remaining as they are.

Award reduced from 5100*l. to* 3000*l. Apportionment reduced pro ratâ. Appellants entitled to costs of the appeal.*

Solicitors for appellants (defendants): *Pritchard & Sons.*

Solicitors for respondents (plaintiffs): *Stokes & Stokes, for Bateson, Warr & Wimshurst, Liverpool.*

(1) [1895] P. 176.

(2) 16 Times L. R. 155.

(3) [1904] P. 83.

T. L. M.

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1905
March 8, 9,
10, 14.

[IN THE COURT OF APPEAL.]

THE LONDON.

Admiralty—Collision—Appeal—Both to blame—Practice—Costs.

In the Admiralty Court the plaintiffs' vessel was found alone to blame for a collision with the defendants' vessel. The plaintiffs, admitting that their vessel was to blame, appealed on the ground that the defendants' vessel was also to blame. The Court of Appeal found the defendants' vessel also to blame, and, with reference to the costs, settled the practice by following *The Ceto*, (1889) 14 App. Cas. 670, and giving the successful appellants their costs of the appeal.

Appeal by plaintiffs, owners of the *Anson*, and her master and crew proceeding for their personal effects, against a decision of Sir F. H. Jeune, President, finding their vessel alone to blame for a collision with the *London*, belonging to the defendants and counter-claimants.

The case is reported in the Court below on the question of the proper signals to be made in foggy weather by a British steam trawler at work in the North Sea (1); but as the plaintiffs, the owners of the *Anson*, for the purposes of the appeal, admitted that their vessel was to blame, the case is only reported on appeal on the question of costs.

On June 5, 1904, a collision occurred during a fog in the North Sea, about eighty-five miles eastward of the Spurn, between the British steam trawler *Anson*, belonging to the appellants (plaintiffs), and the Danish screw steamship *London*, belonging to the respondents (defendants and counter-claimants), resulting in the sinking of the trawler. On July 26 the President (Sir F. H. Jeune), assisted by two of the Elder Brethren of the Trinity House, found that the *Anson* was alone to blame, mainly on the ground that she was not sounding proper fog signals at proper intervals, but that the allegations of negligence against the *London*—namely, that she was, in breach of art. 16 of the Regulations for Preventing Collisions at Sea, proceeding at an excessive speed in the fog then pre-

(1) *The London*, [1904] P. 355.

vailing, that she failed to keep a good look-out, and that she neglected to stop and then navigate with caution on first hearing the whistle of the *Anson*—were not made out. The learned judge, therefore, pronounced against the plaintiffs' claim for damage, and pronounced for the defendants' counterclaim, condemning the plaintiffs in the damage proceeded for therein and in costs.

1905. March 8, 9. The plaintiffs, the owners of the *Anson*, appealed on the ground that, admitting their vessel was to blame, the *London* was also to blame.

Aspinall, K.C., and *Lauriston Batten*, for appellants (plaintiffs), owners of the *Anson*, and her master and crew proceeding for their personal effects.

Robson, K.C., and *Balloch*, for respondents (defendants), owners of the *London* and her freight.

March 10. The Court (Collins M.R., Mathew and Cozens-Hardy L.JJ., assisted by nautical assessors) allowed the appeal mainly on the ground that the evidence as to the impact shewed that the *London* was proceeding at an immoderate speed in fog. The Court, therefore, pronounced the *London* also in fault.

On the question of costs:—

Aspinall, K.C., on behalf of the appellants (plaintiffs), submitted that, as they had admitted that their vessel was to blame and only appealed on the ground that the other vessel was also to blame, they, as successful appellants, were entitled to their costs.

Balloch, for the respondents (defendants), contended that the settled rule of practice in the Admiralty Court, in the Privy Council when exercising Admiralty jurisdiction, and in the Court of Appeal, was that where a collision occurred between two vessels, through the bad navigation of both, the owners of the ships were not entitled to the costs of any litigation arising out of the collision: *The Hector.* (1) See also *The Beryl* (2), *The Arratoon Apcar* (3), and Marsden's Collisions at Sea, 5th ed. (1904) p. 310.

Aspinall, K.C., in reply. The rule upon which the defendants rely has been broken in upon. In *The Batavier* (4) the defendants' vessel was in the Admiralty Court held solely to blame. The Court of Appeal reversed the decision, holding that the collision was caused by inevitable accident; and Lord Esher M.R. said: "It is time that it should be laid down once for all that in every case, unless there are special circumstances to take it out of the general rule, the party who is successful obtains his costs." In *The General Gordon* (5) Butt J. held that in a collision case where both ships are found to blame the plaintiff is entitled to his costs if, in his statement of claim, he admits that he is to blame. The practice contended for by the respondents cannot, therefore, be considered as settled: see Williams and Bruce's Admiralty Practice, 3rd ed. (1902) p. 550.

Collins M.R. As it is desirable to establish a uniform practice, we will consult the other members of the Court before giving our decision.

March 14. Collins M.R. Counsel for the appellants, with the assent of counsel for the respondents, have called our attention to the case of *The Ceto* (6), which was not referred to during the argument as to costs, but which seems to us decisive of the point. There the President, Sir James Hannen, held that one of the vessels, the *Lebanon*, was alone to blame for a collision with the *Ceto*. The owners of the *Lebanon* appealed, admitting that their vessel was to blame, and the only question on the appeal was whether the *Ceto* was also to blame. That is precisely the position in the present case. The Court of Appeal affirmed the judgment of the President. In the House of Lords there was a difference of opinion on the merits of the case; but the judgments appealed from were reversed, and it was declared that both the *Lebanon* and the *Ceto* were in fault, and that the respondents must pay to the appellants their costs in the Court of Appeal and in the House of Lords. The result is, therefore, that the appellants are entitled to their costs of the appeal, and there will be no order as to costs in the Court below.

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(1) (1883) 8 P. D. 218.

(2) (1884) 9 P. D. 137, at p. 144.

(3) (1889) 15 App. Cas. 37, at p. 41.

(4) (1889) 15 P. D. 37.

(5) (1890) 6 Asp. M. L. C. 533.

(6) 14 App. Cas. 670.

Solicitors for appellants (plaintiffs): *Pritchard & Sons, for Andrew M. Jackson & Co., Hull.*

Solicitors for respondents (defendants): *Thomas Cooper & Co.*

T. L. M.

[IN THE COURT OF APPEAL.]

C. A.
1905
March 15, 17, 18.

THE MILLWALL.

Admiralty—Collision—Towage—Damage to Cargo—Contract of Indemnity—Third-party Notice—Appeal by Person not a Party—Rules of Supreme Court, Order XVI., *rr.* 48, 52, 53, 55—*Costs.*

Cargo owners instructed barge-owners to lighter their goods, and, as time pressed, to employ a tug. The tug was so negligently navigated by the servants of the tug-owners that the barge containing the goods was brought into collision with another barge, and the goods thereby damaged. In an action by the cargo owners, as plaintiffs, against the barge-owners and the tug-owners as co-defendants, the barge-owners were dismissed from the suit with costs to be paid by the cargo owners, but the tug-owners were held liable with costs for the damage sustained by the cargo owners, together with the costs to be paid by the cargo owners to the barge-owners. The tug-owners, by a third-party notice, served on the barge-owners, set up a contract of indemnity under which their customers agreed that the tug-owners should "not be answerable for any loss or damage which might happen to, or be occasioned by, any barge, or its cargo, while in tow, however such loss or damage might arise," and undertook to hold them harmless and indemnify them "from any such loss or damage, and against the faults or defaults of their servants or any claim therefor by whomsoever made."

Under the issue raised between the co-defendants by the third-party notice, the barge-owners were adjudged responsible for the amount of the damage for which the tug-owners had been held liable together with the two sets of costs. Both defendants served notices of appeal; but the appeal of the tug-owners was subsequently withdrawn:—

Held, by the Court of Appeal (Collins M.R., Mathew and Cozens-Hardy L.JJ.), first, that the barge-owners could not appeal in respect of the decision in favour of the plaintiffs against the tug-owners, for they were not parties to that judgment, and not having paid the amount adjudged to be due by the tug-owners to the plaintiffs, they were not subrogated to their rights, and, if subrogated, they could not avail themselves of an appeal which the tug-owners had abandoned, nor could they rely on the third-party procedure under the Judicature Act, as no order had been made within the meaning of the Rules of the Supreme Court, Order xvi., r. 53, giving directions as to the mode in, or the extent to, which they were to be bound, or made liable, by the judgment against the tug-owners. Secondly, affirming the judgment of the Court below, that there was no privity of contract between the plaintiffs, the owners of the damaged cargo, and the tug-owners, which would bind the plaintiffs to the conditions attached to the towage, and, therefore, on the construction of the contract of indemnity as between the barge-owners and the tug-owners, the barge-owners not only could not bring an action against the tug-owners for any loss or damage which might happen to, or be occasioned by, any barge or its cargo, while in tow, but the contract assumed an existing liability against which the barge-owners had undertaken to indemnify the tug-owners, so that the barge-owners were liable for the damages recovered by the plaintiffs in the action brought against the tug-owners, together with the costs reasonably incurred by the tug-owners in defending such action, including the costs which the plaintiffs had been adjudged to pay the barge-owners, and which the tug-owners had been ordered to repay to the plaintiffs.

APPEAL by defendants, Darling Brothers, owners of the barge *Millwall*, in an action for damage to goods belonging to the plaintiffs, Charles Page & Co., against two judgments of the late President (Sir F. H. Jeune), the first holding that their co-defendants, Gaselee & Son, owners of the tug *Bee* towing the barge, were liable for the plaintiffs' claim, the second holding that Darling Brothers were liable to indemnify their co-defendants, Gaselee & Son, in respect of the amount with costs adjudged to be paid by Gaselee & Son to the plaintiffs, including the repayment to the plaintiffs of the costs paid to Darling Brothers in respect of the judgment in their favour.

The material facts were shortly as follows:—

On January 18, 1904, the plaintiffs, Charles Page & Co., instructed the defendants, Darling Brothers, by telephone to send a barge to Beckton Gasworks on the river Thames for 572 bags of sulphate of ammonia. As time pressed to catch the steamer *Iago*, loading in the Thames for Venice, Darling

Brothers were further told to employ a tug, and debit the account of Page & Co. instead of conveying the goods to their destination in the ordinary course under oars.

Darling Brothers accordingly ordered a tug from the co-defendants, Gaselee & Son, and on January 21 the tug *Bee* arrived in charge of the servants of Gaselee & Son, and took the barge *Millwall*, laden with Page & Co.'s cargo and in charge of the servant of Darling Brothers, in tow; but those in charge of the tug so negligently managed her as to bring the *Millwall* into collision with a sailing barge at anchor. As the *Millwall* was found to be making water, and the pump was unable to keep it under, she was finally beached at Trinity Wharf, the ammonia being much damaged.

The difference between the sound value of the ammonia and the proceeds in its damaged condition amounted to 555*l.* 17*s.*, for which sum Charles Page & Co., on April 19, brought an action against Darling Brothers and Gaselee & Son jointly and severally in tort for negligence in the navigation of the barge with the plaintiffs' goods on board, and, alternatively, against Darling Brothers in contract for not safely carrying the goods. By their defence Darling Brothers, as owners of the *Millwall*, alleged (inter alia) that the goods were received by them for carriage "on terms established by the course of business and dealing between the parties, viz., that the defendants should not be liable for any loss of or damage to the said goods which could be or in fact was covered by insurance whether such loss or damage did or did not arise from the negligence of the defendants or their servants or agents and on the terms that the plaintiffs should insure against loss of or damage to the goods and that the underwriters should in no case have recourse against the defendants." They further alleged that "In pursuance of the aforesaid arrangement the plaintiffs did in fact insure the said goods and have been paid by their underwriters in respect of the said loss."

By their defence Gaselee & Son, as owners of the tug *Bee*, alleged (inter alia) that the "damage was not caused by or due to the negligence of these defendants in any of the respects alleged or at all," and they served upon the defendants, Darling

Brothers, a third-party notice in the following terms: "Take notice that this action has been brought by the plaintiffs against you and Gaselee & Son for damage to a cargo of sulphate of ammonia by the negligence of one or both of the said defendants. The defendants Gaselee & Son claim to be entitled to be indemnified by you the defendants Darling Brothers against any sum which the plaintiffs may recover in that action against the said Gaselee & Son for damages and costs and against the costs the said Gaselee & Son may incur in defending that action and against the costs of and incidental to this notice and the necessary proceedings consequent thereupon upon the ground that the towage in respect whereof the plaintiffs allege negligence was being performed by the said Gaselee & Son upon their usual terms which so far as they are material are as follows (the additional words in Gaselee & Son's conditions as stated on their bill-heads and note-paper, but omitted in the notice, are included in square brackets): 'Gaselee & Son hereby give notice that they will not be answerable for any loss or damage which may happen to [or be occasioned by] any barge [or vessel] or its cargo while in tow, however such loss or damage may arise, and from whosesoever fault or default such loss or damage may arise; and the services of their tugs must be understood and agreed to be engaged [or accepted] upon the terms that they are to be held harmless and indemnified from any such loss or damage, and against the faults or defaults of their servants, or any claim therefor by whomsoever made. And the customers of the said Gaselee & Son undertake and agree to bear [satisfy] and indemnify them accordingly.'"

On July 11, on the application of the defendants, Gaselee & Son, for directions as regards the third party, the President (Sir F. H. Jeune) made an order that a statement of claim be dispensed with, and that the statement of defence of the third party be delivered within seven days. Accordingly, on July 16, the defendants, Darling Brothers, delivered their defence to the claim under the third-party notice of Gaselee & Son, and pleaded (inter alia) that if the tug "was employed upon the terms alleged which is denied she was employed at the verbal request of and on account of and at the expense of the plaintiffs who were at all times material well aware of the defendants Gaselee & Son's terms of towage."

It was admitted that Darling Brothers had notice of the terms above mentioned of Gaselee & Son, as also that the charge for lighterage (which was not paid) was at the rate of 1*s.* 6*d.* per ton (50 tons, 3*l.* 15*s.*), apart from the charge for the tug debited by Gaselee & Son to Darling Brothers, but not paid as the barge with its cargo never reached its destination. In the ordinary course Darling Brothers would pay Gaselee & Son the amount, less 5 per cent. for cash, and debit Charles Page & Co. in account for the full amount.

On July 29 the President (Sir F. H. Jeune) (assisted by two of the Elder Brethren of the Trinity House) held that the defendants Gaselee & Son, as the owners of the tug *Bee*—in whose control the navigation of the barge *Millwall* was at the material time—had been negligent through their servants in the management of the tug, and thereby brought about the collision between the barge *Millwall* and the barge at anchor, so that they were responsible to the plaintiffs, Charles Page & Co., for the damage to their cargo, and, as there was no negligence attributable to the barge, it was unnecessary to consider the nature of the contract between the plaintiffs and the defendants, Darling Brothers. The learned judge, therefore, gave judgment in favour of the defendants, Darling Brothers, in respect of the plaintiffs' claim against them, with costs to be paid by the plaintiffs, and gave judgment for the plaintiffs against the defendants, Gaselee & Son, in respect of the claim for damage occasioned to the cargo on board the barge *Millwall*, with costs; Gaselee & Son to repay to the plaintiffs the taxed costs of the defendants Darling Brothers. In respect of the claim for indemnity by the defendants, Gaselee & Son, against the defendants Darling Brothers, the learned judge held that Darling Brothers were not simply agents of Charles Page & Co. in respect of the engagement of the tug, but that there was one contract between Page & Co. and Darling Brothers, and another between Darling Brothers and Gaselee & Son, so that there was no privity of contract between Page & Co. and Gaselee & Son which would render the conditions imposed by

Gaselee & Son binding on Page & Co., and that under the first part of the indemnity clause Darling Brothers could not bring an action against Gaselee & Son for any loss or damage which might happen to, or be occasioned by, any barge or vessel or its cargo while in tow, and, under the second part, Darling Brothers, as the owners of the *Millwall*, had agreed to indemnify Gaselee & Son, as the owners of the tug *Bee*, against liability in respect of claims brought against them as tug-owners by third parties. The learned judge, therefore, considering that Gaselee & Son, though unsuccessful, had acted reasonably in defending the action, gave judgment on July 30 in favour of Gaselee & Son against Darling Brothers in terms of the third-party notice, with costs. (1)

The defendants, Gaselee & Son, on August 12, served the plaintiffs with notice of appeal against the judgment of the late President of July 29 so far as it affected them, but on October 12 withdrew the appeal.

The defendants, Darling Brothers, appealed against so much of the judgment of the late President of July 29 as found in favour of the plaintiffs against Gaselee & Son, and appealed against the whole of the judgment of July 30.

In respect of the first ground of appeal by Darling Brothers:—

1905. March 15. *Scrutton, K.C.*, and *A. D. Bateson*, on behalf of the respondents (plaintiffs), Charles Page & Co., took the preliminary objection that, by the terms of the notice of motion served on the plaintiffs, the appellants, Darling Brothers, appealed from "so much of the judgment of the President, delivered on July 29, as pronounced in favour of the plaintiffs' claim against Gaselee & Son, the owners of the *Bee*, in respect of the plaintiffs' claim for damage occasioned to the cargo on board the barge *Millwall* whilst in tow of the *Bee*"; but the appellants, Darling Brothers, not being parties to the judgment obtained by the plaintiffs, Charles Page & Co., against the defendants, Gaselee & Son, could only appeal if subrogated to the rights of Gaselee & Son. There could be no subrogation until Darling Brothers had paid the amount for which

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(1) [1904] W. N. 169.

Gaselee & Son had been held liable, which had not been done, and even if they were subrogated they could not appeal, as they could only have such rights as Gaselee & Son had, and Gaselee & Son had abandoned their appeal; nor could they rely upon the third-party procedure sanctioned by the Judicature Act, for no order had been made under the Rules of the Supreme Court, Order XVI., rr. 48, 52, 53, and 55, giving directions as to the mode in, or extent to, which Darling Brothers were to be bound or made liable by the judgment against Gaselee & Son, so as to substitute Darling Brothers for Gaselee & Son and entitle them to appeal.

[The case of *West of England Fire Insurance Co.* v. *Isaacs* (1) was referred to.]

Carver, K.C., *Laing, K.C.*, and *Balloch*, contra. The plaintiffs first brought their action against the owners of the barge, and then joined the owners of the tug as co-defendants. Thereupon the owners of the tug served the owners of the barge with a third-party notice, and, under a summons for directions, the procedure indicated by the pleadings as they now stand was followed. By rule 55 of Order XVI., in the case of a defendant claiming against a co-defendant under a notice, "the same procedure shall be adopted, for the determination of such questions between the defendants, as would be issued and taken against such other defendant, if such last-mentioned defendant were a third party." In the result, the effect of the third-party procedure was to make the judgment obtained by the plaintiffs against the tug-owners binding on the third party—that is, the owners of the barge; and, therefore, the owners of the barge are entitled to appeal as representing the owners of the tug, and as being defendants who, under the order made on the summons for directions, took part in the trial; but, if they are not so bound, they are entitled to appeal on their own account against the judgment, in order to shew that it was wrong in finding that any liability attached to the owners of the tug, for, if so, no liability would arise against the owners of the barge under the indemnity clause.

[The Judicature Act, 1873, s. 19, the Rules of the Supreme

(1) [1897] 1 Q. B. 226.

Court, Order LVIII., r. 1, *Markham* v. *Markham* (1), and *Attorney-General* v. *Marquis of Ailesbury* (2) were referred to.]

COLLINS M.R. This is a preliminary objection taken by Charles Page & Co. to the appeal being heard so far as it affects them. Page & Co. were the owners of a cargo of sulphate of ammonia, which was in a barge called the *Millwall* belonging to Darling Brothers, and that barge was being towed by a tug belonging to Gaselee & Son. While the barge was being towed to a steamer in the Thames, on which the cargo was to be shipped for its destination, she came into collision with a barge at anchor, and the cargo in the *Millwall* was damaged, and Page & Co. brought an action against the owners of the tug, joining as defendants the owners of the barge, claiming from both, or either of them, in the alternative, damages for the injury to the cargo in the barge. At the trial the learned judge held that the tug-owners were liable, and that the barge *Millwall* was not to blame. He therefore gave judgment for the plaintiffs against the tug-owners, and for the owners of the barge against the plaintiffs. He followed that up by holding that the plaintiffs were entitled to recover from the tug-owners, not only the costs of their action against the tug-owners, but also the costs payable by the plaintiffs to the owners of the barge. The owners of the tug gave notice of appeal against that judgment, but that appeal they afterwards abandoned. Therefore, as matters now stand, there is no appeal by the owners of the tug against Page & Co.

It appears that after the matter had been disposed of between the plaintiffs and the defendant tug-owners, an application was entertained by the late learned President in the absence of the plaintiffs, who were not concerned with it, in respect of an indemnity, and he held that the owners of the barge were bound to indemnify the owners of the tug in respect of the damages recovered by the plaintiffs, Page & Co. The owners of the barge seek now to appeal, and question the decision as between the owners of the tug and the plaintiffs. The point is taken for the plaintiffs that that is not an appeal which the owners of the barge are in a position to make. It is an appeal as to a decision between the plaintiffs and other parties, namely, the owners of the tug; and the plaintiffs say, therefore, that the owners of the barge cannot draw that question into discussion by way of appeal unless they were either themselves parties to that decision, or are subrogated to the rights of one of the parties. Obviously they are not parties to the decision, and they are not subrogated to the right of appeal, because if they come in, or claim to come in, by subrogation they can only have the rights possessed by those whose position they take; and inasmuch as the owners of the tug have lost their right of appeal, by abandoning it, it is not possible for any one else by subrogation to take their right of appeal. Counsel for the owners of the barge do not dispute that, and say that they do not rest their case upon subrogation, but upon the machinery of the third-party procedure of the Judicature Act. When, however, we come to examine what has taken place in this case, it seems to me that there has been no decision which will put the owners of the barge into the shoes of the tug-owners for the purpose of questioning the decision of the Court below as between the plaintiffs and the owners of the tug. There would, I think, have been power under the Judicature Act had the Court been invited to do it; but there is no order, and the Court was not invited to substitute the owners of the barge for the owners of the tug in regard to an appeal against the decision of the Court, as between the plaintiffs and the owners of the tug. Order XVI., r. 53, is the rule which, I think, deals with the matter, and which, I think, really determines this case. It is in these terms: "The Court or a judge upon the hearing of the application mentioned in rule 52, may, if it shall appear desirable to do so, give the third party liberty to defend the action, upon such terms as may be just, or to appear at the trial and take such part therein as may be just, and generally may order such proceedings to be taken, documents to be delivered, or amendments to be made, and give such directions as to the Court or judge shall appear proper for having the question most conveniently determined, and as to the mode and extent in or to which the third party shall be bound or made liable by the judgment in the action." Rule 52, which is mentioned, is as follows: "If a third party appears pursuant to the third-party notice, the defendant giving the notice may apply to the Court or a judge for directions, and the Court or judge, upon the hearing of such application, may, if satisfied that there is a question proper to be tried as to the liability of the third party to make the contribution or indemnity claimed, in whole or in part, order the question of such liability, as between the third party and the defendant giving the notice, to be tried in such manner, at or after the trial of the action, as the Court or judge may direct; and, if not so satisfied, may order such judgment as the nature of the case may require to be entered in favour of the defendant giving the notice against the third party."

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(1) (1880) 16 Ch. D. 1.

(2) (1885) 16 Q. B. D. 408, at p. 412.

Now, no order has been made determining that the third parties, the owners of the *Millwall*, were bound by the judgment in the action, and therefore, so far as I can see—without expressing any opinion—there is nothing binding the barge-owners by the result of the judgment between the plaintiffs and the tug-owners. There is no provision whereby the owners of the barge have been substituted as defendants, giving them all the rights in the conduct of the trial, with the right to appeal in their own name. In point of fact, counsel for the defendant barge-owners are not able to point to any order made under the powers of the Judicature Act giving them any special rights, and therefore, if they have any rights, they only have them under subrogation; but, as I have already pointed out, they are not subrogated to anything, because the persons to whom they would be subrogated have abandoned the right of appeal. Therefore, in my opinion, Darling Brothers are not in a position on this appeal to question the decision pronounced by the President as between the plaintiffs and the tug-owners.

MATHEW L.J. I am of the same opinion, for the reasons given by the Master of the Rolls.

Cozens-Hardy L.J. I am also of the same opinion. I think rule 53 is sufficient to enable us to decide this case, for the mere bringing in of a third party does not, apart from some subsequent order, make the judgment in the action binding upon him. I think that conclusion is fortified by the language of rule 55, which provides that: "Where a defendant claims to be entitled to contribution or indemnity against any other defendant to the action, a notice may be issued and the same procedure shall be adopted, for the determination of such questions between the defendants, as would be issued and taken against such other defendant, if such last-mentioned defendant were a third party; but nothing herein contained shall prejudice the rights of the plaintiff against any defendant in the action." One of the rights of the plaintiffs in this case as against the tug-owners is that the plaintiffs have got a judgment against the tug-owners against which an appeal has not been brought, and it seems to me that the present application really goes in the teeth of those words at the end of rule 55. This is an application in prejudice of the plaintiffs, but no order has been made enabling the third party to defend the action by the plaintiffs against the tug-owners. There was a lis as between the plaintiffs and the owners of the barge, in which the plaintiffs were unsuccessful; there was another lis between the plaintiffs and the tug-owners, in which the plaintiffs have been successful; and we are asked by persons who are or may be, as between themselves and the tug-owners, affected by the judgment in the latter case to say that, in the absence of any order, they ought to have a right of appeal, although there is nothing in the Judicature Act of 1873 or the rules which confers that right.

It seems to me that the limits to which the right of appeal extends in the exceptional cases dealt with in Order XVI. are shewn in the judgment of Cotton L.J. in *In re Youngs* (1), where he says that "there is no power to give to a person who could not be made a party to the action leave to appeal against the judgment." If the owners of the *Millwall* had obtained an order allowing them to defend the action against the tug-

(1) (1885) 30 Ch. D. 421.

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owners, then they might possibly have appealed against the judgment. That they cannot now do.

Preliminary objection upheld. Appeal by defendants, Darling Brothers, against plaintiffs (respondents), Charles Page & Co., dismissed with costs.

In respect of the appeal by the owners of the *Millwall* against the judgment holding them liable to indemnify the owners of the tug:—

March 17. *Carver, K.C., Laing, K.C.,* and *Balloch,* for the appellants (defendants), Darling Brothers. The finding of the learned judge in the Court below as to the negligence of those in charge of the tug is not disputed; but it is contended that the defendants, Darling Brothers, were, in respect of the employment of the tug, in the position of agents only, for, in the ordinary course, the plaintiffs' goods would have been conveyed to their destination by Darling Brothers as lightermen in one of their barges under oars, on the terms of no liability for negligence, and the arrangement to employ a tug, to expedite the carriage of the goods, and debit the plaintiffs' account with the hire of the tug, was for the benefit of the plaintiffs and by their order. As it was at their instance that the tug was engaged, the plaintiffs became bound by the conditions under which the tug was employed, and, the contract of towage being between the owners of the tug and the plaintiffs, privity of contract was established between the plaintiffs and the owners of the tug, and the plaintiffs took upon themselves the risks and liability attaching to the towage. In the ordinary course, also, the plaintiffs would be debited by the owners of the barge with the amount of the towage, because it was a convenient arrangement for the owners of the barge to pay the owners of the tug, less a discount of 5 per cent. for cash, whilst the full amount would be charged by the owners of the barge to the plaintiffs in their running account; but this would not render Darling Brothers any the less agents only of the plaintiffs, for they received no consideration for insuring a fresh risk.

If the defendants, Darling Brothers, are right in their contention that the plaintiffs are bound as principals by the conditions attached to the towage, and, therefore, could not claim against the owners of the tug, then the owners of the tug cannot call upon Darling Brothers to indemnify them against a liability to the plaintiffs which did not exist, and, therefore, the claim of Gaselee & Son against Darling Brothers fails. If, however, it should be held that Darling Brothers contracted with the owners of the tug on their own account, and not as agents of the plaintiffs, the claim under the third-party notice would still fail, because Gaselee & Son were not liable for negligence in accordance with the well-known practice of tug-owners, who only accept the towage on the terms of non-liability—in other words, as the plaintiffs instructed Darling Brothers to employ a tug, they impliedly authorized Darling Brothers to put the goods in charge of a tug on the usual terms, and the negligence clause is usual—that is, the plaintiffs could not proceed against the owners of the tug without being subject to the contract lawfully made by Darling Brothers, and they are estopped from saying that the contract was on any other terms: *Delaurier* v. *Wyllie.* (1) A similar principle gives rise to the non-liability of a railway company, where a person travels at his own risk over their line under contract with another company: *Hall* v. *North Eastern Ry. Co.* (2) The judgment of Blackburn J. in that case shews that an authority to one railway company to forward the plaintiff by another line at his own risk is a defence available to the other company by whom he was forwarded, without shewing any contract with them. The principle is further illustrated by such cases of hiring as *Singer Manufacturing Co.* v. *London and South Western Ry. Co.* (3) or *Keene* v. *Thomas* (4), which shew that a bailor's rights may be qualified by the bargain made by the bailee within his authority. Here the carriage was on terms which the plaintiffs had authorized Darling Brothers to make, and the plaintiffs cannot claim in defiance of those terms—that is to say, the owners of the tug can

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(1) (1889) 17 R. 167.
(2) (1875) L. R. 10 Q. B. 437.
(3) [1894] 1 Q. B. 833, at p. 837.
(4) [1905] 1 K. B. 136.

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only succeed against the owners of the barge by shewing a liability in law to the plaintiffs, and an obligation on the owners of the barge to indemnify them against that liability; but if there is no liability to the plaintiffs, there is no obligation on the owners of the barge to indemnify.

Again, assuming that Gaselee & Son were liable to the plaintiffs, still Darling Brothers cannot be made liable for the costs incurred by Gaselee & Son in defending the action, for, in any reading of the indemnity clause, these costs are not included. The words in the first part of the clause are, "loss or damage," and in the second part, "such loss or damage." The conditions nowhere state that if the owners of the tug are sued to judgment by a third party, the owners of the tug can turn round and claim from the owners of the barge, not only what they have had to pay under the judgment, but also the costs, for the words only refer to loss of or damage to the cargo, and do not include a contract by Darling Brothers to indemnify Gaselee & Son against costs. Where, under the old form of clause, underwriters agreed to indemnify their assured against loss or damage, the indemnity only included the loss or damage, not the costs of resisting a claim: *Xenos* v. *Fox*. (1)

J. A. Hamilton, K.C., and *Bailhache*, for the respondents (defendants), Gaselee & Son, owners of the tug *Bee*. The indemnity clause assumes an existing liability to third persons, and, in respect of that liability, a right of indemnity in favour of the owners of the tug against the owners of the barge—that is, it throws the liability arising from the carriage of the cargo upon the owners of the barge, and—in respect of the obligation to third parties arising out of the collision and consequent damage to the cargo on board the *Millwall*—operates only between the owners of the tug and the owners of the barge. As it did not affect the owners of the cargo, or other persons, the owners of the tugs could not set up the indemnity clause as a defence to the claim of the plaintiffs, for there was no privity of contract between them.

[MATHEW L.J. Suppose the plaintiffs had expressly autho-

(1) (1869) L. R. 4 C. P. 665.

rized the defendants, Darling Brothers, to employ a tug under a negligence clause. Could the plaintiffs recover against the tug?]

That would depend upon whether there was a mandate to make a contract on those terms. The clause relied on by the owners of the tug as against Darling Brothers was not operative against those who were ignorant of it—that is to say, the clause is no defence to third persons, for, unless privity is established, the clause has no application; but, as between the owners of the tug and the owners of the barge, the effect of the clause is that the goods are carried at the risk of the owners of the barge.

The costs are included, as they are part of the loss incurred and arise out of a reasonable attempt by the owners of the tug to diminish the liability ultimately falling on the owners of the barge, according to the principle laid down in *Hammond* v. *Bussey* (1), where it was held that the plaintiffs, in the circumstances, acted reasonably in defending the action in respect of which the question arose, and that the costs consequently incurred were recoverable by them from the defendant as damages under the rule in *Hadley* v. *Baxendale.* (2) The owners of the tug, by means of the third-party notice, gave the owners of the barge the opportunity to obtain leave to defend the action brought against the owners of the tug or, at any rate, to warn the owners of the tug not to defend the action, and that, if they did defend, it would be at their own risk as to costs.

Carver, K.C., in reply. The argument on behalf of the respondent tug-owners ignores the first part of the indemnity clause, which is general and applicable to every one. It gives notice that the tug-owners will not be liable for negligence, and is, therefore, binding on the owner of the goods which are entrusted to the care of the barge-owners, who, in turn, are, as bailees, clothed with authority to employ a tug to convey them on those terms. The second part of the clause presupposes an antecedent liability; but in this case the tug-owners by the terms of the contract were relieved from that liability towards the plaintiffs, and, therefore, the antecedent liability did not exist.

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(1) (1887) 20 Q. B. D. 79.

(2) (1854) 9 Ex. 341.

March 18. COLLINS M.R. The facts appear to be that the damaged cargo of sulphate of ammonia, belonging to the plaintiffs, Charles Page & Co., was placed by them in a barge belonging to Darling Brothers, one of the defendants, for the purpose of being delivered to a steamer lying in the Thames, and carried by that vessel to its destination, but there being a doubt, having regard to the time at the disposal of the parties, whether the barge could reach the vessel in time, some discussion took place between the plaintiffs, Page & Co., the owners of the cargo, and Darling Brothers, the owners of the barge. A conversation took place over the telephone, and the result was that the owners of the barge pointed out that the barge might possibly take so much time as to make it uncertain whether she would reach the vessel to which the ammonia had to be delivered. It was therefore suggested, and the suggestion was approved by the plaintiffs, Page & Co., that a tug should be engaged. Accordingly a tug was engaged by the barge-owners, Darling Brothers, and the tug and barge were proceeding from Beckton gasworks to their destination when a collision occurred between the defendants' barge, the *Millwall*, and another barge at anchor in the river, with the result that very considerable damage was done to the ammonia in the barge belonging to the defendants.

The consequence was that Page & Co. brought an action against both the barge-owners, Darling Brothers, and the tug-owners, Gaselee & Son, and in those proceedings Gaselee & Son, the owners of the tug, issued a third-party notice to their co-defendants. That third-party notice led to discussion in chambers, and an order was made by the judge dealing with the rights of the parties in view of that notice. When the case was tried the learned judge came to the conclusion that Darling Brothers, the owners of the barge, were free from blame, and as between them and the plaintiffs the learned judge ordered the plaintiffs to pay their costs; but he came to the conclusion that the tug was guilty of negligence, and that the whole disaster was due to her negligence, with the result that he gave the plaintiffs judgment against Gaselee & Son, the owners of the tug, with costs, and at the instance of the plaintiffs, inasmuch as the plaintiffs had been put to the trouble and expense of suing these two defendants through not knowing which of them was to blame, the learned judge made an order that the tug-owners, the tug being the real source of the mischief, should pay to the plaintiffs the costs which the plaintiffs, on the judge's order, had to pay to the barge-owners.

The plaintiffs were satisfied with that order; but after their counsel had left the Court a discussion arose between the owners of the barge and the owners of the tug. It was brought to the notice of the President that the contract of towing had been made upon the terms of a written agreement between Darling Brothers, the owners of the barge, and Gaselee & Son, the owners of the tug, and it was contended by the tug-owners that the effect of that agreement was to shift the responsibility for the damage done to the plaintiffs' cargo from the tug on to the barge. The learned President took that view, with the result that the barge-owners, who had been freed from blame in the first instance and had been given the right to recover their costs from the plaintiffs, now found that, after having been held free from blame, they were to bear the whole liability. Thereupon the barge-owners sought to discuss with the tug-owners the question whether the original decision was right or not, and the tug-owners gave notice of appeal, but, after a time, abandoned the appeal, which the barge-owners, however, who had an interest in setting aside the original decision, endeavoured to go on with as though they stood in the shoes of the tug-owners.

That point we have already decided against the barge-owners by holding that they have no right to substitute themselves for the tug-owners as a third party.

Counsel on behalf of the barge-owners now seek to impugn that judgment, which they certainly have not got the right to appeal against, though it may be that that judgment may not bind them by way of estoppel in these proceedings, still they are attempting to impugn an order made on the basis of a judgment which they cannot appeal against. They urge that, assuming they cannot appeal against that judgment, it is not a judgment binding upon them so as to debar them from saying that the judgment was wrong in that the tug-owners were never in point of fact liable to the plaintiffs. That is their first point. I am not deciding that it is open to them to impugn that judgment, but I will assume that it is open to them to do so. That being so, the point made on that is that when we come to look at the provisions of the agreement made between the barge-owners and the tug-owners they have, rightly construed, the effect of relieving the tug-owners from all liability, not only to the barge-owners, but to the plaintiffs also, and that if the tug-owners were never liable to the plaintiffs, all the superstructure built up on their liability falls to the ground. That turns upon the construction of the document itself. [The learned judge read the terms of the contract already set out, and continued:—]

The point taken by counsel for. the barge-owners upon that document is that the circumstances under which it came into existence shew that it established privity and was intended to establish privity between the plaintiffs and the defendants, the owners of the tug. Upon that part of the matter, which is a question of fact, as to the circumstances under which the engagement of the tug was made, the learned President came to the conclusion that privity was not established. He held that Darling Brothers made this contract directly with the tug-owners—no doubt with the sanction of the plaintiffs, but not so as to create privity between the plaintiffs and the defendant tug-owners. It is not necessary for me to restate the evidence. I see no reason for differing from the conclusion arrived at by the learned judge as to the arrangement between the parties. Therefore I start with that finding that this document was not intended to create and did not create privity between the owners of the cargo and the tug-owners. Of course, if privity were created, that would be favourable to the contention of counsel for the barge-owners. There would be, upon the contract between the parties, complete immunity given to the tug. On the other hypothesis, that privity is not established. It is nevertheless contended on behalf of the barge-owners that the true effect of this document was that the cargo was carried at owner's risk. It seems to me that the answer to that argument is in the construction of the document. This document, when it comes to be construed, does not amount to a contract to tow at owner's risk. On the contrary, it is a document which presupposes a liability to some one, created by the fault of the tug, and secures an indemnity against the consequences of that fault. In other words, taking it altogether, it is a contract of indemnity which presupposes something against which it is necessary to be indemnified. Counsel for the barge-owners say that that part stands alone and is separated from the rest of the contract, and is merely a declaration of repudiation of liability. I think the answer is that it does not stand alone—that the document must be read as a whole, and the words "such loss or damage" refer to the loss or damage previously mentioned.

It seems to me, therefore, that the first point attempted to be made on behalf of the barge-owners, namely, that there was no liability on the tug to the plaintiffs, fails, and we must consider the appeal only on the ground of their second argument. Assuming, they say, that liability has been established against the barge-owners to indemnify the tug, that liability must be limited to loss or damage, and therefore they cannot recover the costs of the proceedings, which the President ordered them to pay. Now, that raises the question whether, having regard to the circumstances of the case, the third-party order, and all the other facts, it can be said that the tug-owners, in defending this action, acted otherwise than reasonably—whether, having given the person who would be ultimately liable for anything they had to pay full notice of the claim and full opportunity of intervening and paying the loss, and of ascertaining, if the liability existed, the full extent of that liability, it is nevertheless competent for that person to throw the whole burden of litigation upon the tug-owners. It seems to me that the case falls within the principle laid down long ago in the case of *Broom* v. *Hall*. (1) The head-note to that case is as follows: "A., a broker, contracted with B. for the purchase (on behalf of C.) of certain goods. C. refusing to accept the goods, B. sued A. for the breach of contract. C. had notice of the proceedings, but repudiated his liability, and A. defended the action unsuccessfully. In an action by A. against C. for the damages and costs paid and incurred by him in the first action, C. paid into court enough to cover the damages only, and it was left to the jury to say whether A., in defending the former action, had pursued the course which a prudent and reasonable man would have done in his own case. The jury having found for the plaintiff: *Held*, that A. was entitled to recover the costs." There is no doubt that after that decision there were one or two cases in which it does not seem to have been given full effect to, as in *Baxendale* v. *London, Chatham and Dover Ry. Co.* (1); but all those cases were considered in the case of *Hammond* v. *Bussey* (2), which referred to it, and, it seems to me, returned to the principle laid down in *Broom* v. *Hall* (3), namely, that costs reasonably incurred in defending an action in which there was a liability over to a third person in respect of the damages were properly recoverable, as well as the damages against that other person. In this case there was no jury to decide whether the tug-owners acted reasonably in defending the action; but the learned judge arrived at the conclusion, under all the circumstances, that the defendant tug-owners, who had this right of indemnity over, acted reasonably in defending the action, and it seems to me that the evidence is exceedingly strong in favour of that view, because the object of third-party proceedings is to give an opportunity to the third party, if he be so minded, to prevent the catastrophe of an adverse decision, which would have the effect of ultimately saddling him with liability. It seems to me that, having regard to all the circumstances of the case, the tug-owners gave the barge-owners, who were ultimately liable, full notice of the claim, they served a third-party notice upon them which gave them full opportunity of intervening and disputing the claim, and they did all they were bound to do as reasonable men in order to ascertain whether liability did exist, and to limit the extent of it as far as possible. Therefore, it seems to me that Darling Brothers are liable to make good those costs. Counsel for Darling Brothers further contended that the terms of the document itself excluded that liability. It is true that the terms of the document itself do not expressly provide for the costs of litigation, because I think "loss or damage" refer to the results of the collision itself, and, no doubt, sometimes there is a provision as to the payment of costs introduced into the contract of indemnity itself; but I do not think that is really conclusive. It is by reason of the fact that there is a contract of indemnity which will have the effect of rendering a third party liable that the question arises whether or not the party primarily liable is acting reasonably in resisting the original liability, and that the third party himself becomes liable to the costs of investigating something which he had it in his power to admit; and where he has notice enabling him to take steps, if so minded, to avoid the costs. It is not a contract arising under the terms of the indemnity, but it is a contract beginning after the contract of indemnity is proved to exist, and arises out of the conduct of the parties in view of the fact that the contract of indemnity does exist. Therefore it is no answer to this case to say that the terms of the document itself do not specifically embrace the obligation to be liable for the costs of the litigation as well as the original loss. The result is that I think the appeal of the barge-owners fails, and that the order of the learned judge below must stand.

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(1) (1859) 7 C. B. (N.S.) 503.

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(1) (1874) L. R. 10 Ex. 35.

(2) 20 Q. B. D. 79.

(3) 7 C. B. (N.S.) 503.

MATHEW L.J. I am of the same opinion. It seems to me that there is no question that the learned judge was entitled to add the costs to be paid to the barge-owners to the damages recovered from the tug-owners. That order, however, did not have the effect that might be expected. There was this contract of indemnity, which cast upon the barge-owner the costs of which he was held entitled to be relieved by the learned judge.

COZENS-HARDY L.J. I am of the same opinion. I agree with the view of the Master of the Rolls that on the facts there is no privity of contract between the plaintiffs and the tug-owners, and that the contract with the conditions of towage are conditions between the tug-owners and the barge-owners alone. The only point upon which I desire to add a word is as to whether, the costs not being mentioned in the contract of indemnity, the tug-owners are entitled to claim the costs of the litigation in which the liability has been established. This is only one of many classes of cases in which the question of the costs of indemnity arises. It has been well settled, I think, that in cases of this sort the costs of the litigation are invariably given to the person who is entitled to the indemnity. I refer to the cases in which two trustees are held liable for breach of trust, and as between them one is primarily liable. In those circumstances it is well established that the trustee who is primarily liable is not only bound to indemnify his co-trustee against the amount which he has to pay to the estate, but is also liable for the costs of his co-trustee. Lord Cranworth decided that in the case of *Lockhart* v. *Reilly* (1), and the principle was recently applied by Warrington J. in the case of *In re Linsley, Cattley* v. *West* (2), where it was held that a solicitor trustee, to whom the management of the trust has been left as the acting trustee, is liable to indemnify his co-trustee against the costs of an action caused by his negligent conduct of the trust business, even where no actual loss has been thereby occasioned to the trust estate. I think that is exactly the principle upon which the learned judge in the Court below and the Master of the Rolls have proceeded with reference to this case. That is no new principle.

Appeal dismissed with costs.

Solicitors for appellants (defendants), Darling Brothers: *Keene, Marsland, Bryden & Besant.*

Solicitor for respondents (plaintiffs), Charles Page & Co.: *James Ballantyne.*

Solicitors for respondents (defendants), Gaselee & Son: *J. A. & H. E. Farnfield.*

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(1) (1856) 25 L. J. (Ch.) 697.

(2) [1904] 2 Ch. 785.

T. L. M.

[IN THE COURT OF APPEAL.]

C. A.

1905
March 11, 14;
May 4.

THE HARVEST HOME.

Admiralty—Collision—Damage—Tug and Tow—Third Vessel—Pilot Cutter lashed to Tow—Independent Duty of Tug to avoid Danger—Identification—Reasonable Care—Joint Tortfeasors—Costs.

Two tugs were towing a sailing vessel, in charge of a pilot, down the Bristol Channel, with a pilot cutter made fast to the sailing vessel, when, owing to the negligence of the tow and her tugs, the pilot cutter was sunk by collision with a schooner, which was also damaged. In an action by the owners of the pilot cutter against the owners of the schooner and the owners of the tugs, in which the owners of the schooner counter-claimed against the pilot cutter and the tugs, it was held in the Court below (*The Harvest Home*, [1904] P. 409) that, on the authority of *The Altair*, [1897] P. 105, the pilot cutter and the schooner were entitled to succeed against the tugs, for, though those in charge of the tow were negligent in not properly directing the tugs, an independent duty was cast upon the tugs to exercise reasonable care and skill in keeping clear of the schooner, and further, following *The Bernina*, (1888) 13 App. Cas. 1, that the pilot cutter was not identified with the sailing vessel so as to be unable to recover.

On appeal by the owners of the tugs against the owners of the pilot cutter:—

Held, by the Court of Appeal (Collins M.R., Mathew and Cozens-Hardy L.JJ., assisted by nautical assessors), that though the pilot cutter was lashed alongside the tow, those in charge of her were nevertheless bound to take reasonable care to avoid danger, and, had they kept a good look-out, they would have seen the schooner in time to have slipped the rope and gone clear. The pilot cutter was, therefore, also to blame, and the liability of the owners of the tugs thereby reduced to a moiety of the claim of the owners of the pilot cutter, without reference to the liability of the tugs in respect of the damage to the schooner, and, in accordance with the Admiralty rule, each party must pay their own costs in the Court below and of the appeal.

APPEAL by the owners of the tugs *Clarissa* and *Nora*, some of the defendants in an action of damage by collision, against a judgment of the President (Sir F. H. Jeune) in favour of the owners of the pilot cutter *Emily* and her master and crew proceeding for their lost effects.

The case is fully reported in the Court below (1), first, on the question of the independent duty cast upon tugs whilst

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(1) [1904] P. 409.

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towing a vessel in charge of a pilot to keep clear of danger; secondly, as to the alleged identification of a pilot cutter with a vessel in tow alongside which she is lashed; and, thirdly, as to the right of a tug to towage remuneration although debarred by her negligence from salvage; but on the appeal the only question raised was whether, assuming that the tugs *Clarissa* and *Nora* were to blame, the pilot cutter *Emily* was not also to blame.

On March 14, 1904, about 11 P.M., the sailing ship *Moy* was in the Bristol Channel off the Nash Light. She had two tugs towing her on a westerly course at a speed of about five knots, the *Clarissa* on the starboard and the *Nora* on the port bow, with scopes of ninety fathoms on their tow-ropes. The *Emily*, a pilot cutter of eighteen tons register, manned by a crew of five hands, with no sail set, was made fast on the starboard bow of the *Moy*, and was being towed abreast of the starboard side of that vessel, waiting to take off the pilot. In these circumstances the plaintiffs, the owners of the pilot cutter *Emily* and her master and crew, alleged that those in charge of that pilot cutter observed about one or two points on their starboard bow, and distant about three miles, a low white light, which (they alleged) proved to be the stern light of the *Harvest Home*, a schooner of 102 tons register and four hands, bound from Londonderry to Cardiff. The stern light gradually broadened on the starboard bow of the *Emily*, which continued to be towed on a westerly course and was overtaking the *Harvest Home*, but when in a position to pass well clear to the southward of the *Harvest Home*, that schooner suddenly opened her red light and was seen to be standing to the southward on the port tack. As the *Harvest Home* was coming rapidly towards the *Emily*, causing danger of collision, fenders were put out between the *Emily* and the *Moy*, and the *Emily's* rope was ordered to be slipped; but before this could be done the *Harvest Home* with her stem and port bow struck the starboard side of the *Emily*, cutting her in two and causing her to founder.

In the Court below the President (Sir F. H. Jeune) found as a fact that the *Harvest Home* never shewed a stern light to the down-coming tugs and their tow, but after lying becalmed with her head E.S.E. had, when the wind sprang up, proceeded on the same course up channel, and the learned judge held that the plaintiffs, the owners of the pilot cutter *Emily* and her master and crew, and the owners of the schooner *Harvest Home* as counter-claimants, were entitled to succeed against the owners of the tugs *Clarissa* and *Nora* on the ground that, though those in charge of the tow were negligent in not properly directing the tugs, an independent duty was cast upon the tugs to exercise reasonable care and skill in keeping clear of the schooner.

March 11, 14. *Aspinall, K.C.*, and *Bailhache*, for the appellants (defendants), owners of the tugs *Clarissa* and *Nora*, admitted in the course of the argument that the tugs were to blame, but submitted that, on the evidence, the pilot cutter *Emily* ought also to be pronounced in fault.

Robson, K.C., and *D. Stephens*, for the respondents (plaintiffs), the owners of the *Emily* and her master and crew.

The arguments of counsel sufficiently appear from the judgment.

[*The Bywell Castle* (1), *The Duke of Buccleuch* (2), the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 419, sub-s. 4, and the Regulations for Preventing Collisions at Sea, 1897, art. 22, were referred to.]

COLLINS M.R. This is an appeal from the decision of Sir Francis Jeune in a case of collision. One of the plaintiffs is a pilot, and his cutter, the *Emily*, was in attendance on him, he being engaged in piloting a ship called the *Moy* down the Bristol Channel. The *Moy* was in tow of two tugs. It was necessary for the pilot to go ashore when the *Moy* reached a certain point where his duties ceased, and therefore his cutter was lashed to the *Moy*, and was being towed on the starboard side. A collision occurred between the *Moy*, with this pilot cutter attached to

(1) (1879) 4 P. D. 219. (2) [1891] A. C. 310.

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her, and a schooner called the *Harvest Home*, and these proceedings were initiated by an action brought by the owners, master, and crew of the pilot cutter against the owners of the *Harvest Home*; and they charged the *Harvest Home* with negligently running into them, involving the sinking of the pilot cutter. In the alternative they claimed against the owners of the tug *Nora*, who are also owners of the tug *Clarissa*, and alleged that the collision was brought about by the negligence of the two tugs which were towing the *Moy*. In the result the President rejected the case made by the *Emily* as to the conduct of the *Harvest Home*. He acquitted the *Harvest Home* of any negligence contributing to the accident.

The plaintiffs said they saw the stern light of the *Harvest Home* about three miles off on the starboard bow—which would make the *Harvest Home* to be going in the same direction as the *Moy*—and that then the *Harvest Home* executed a most extraordinary manœuvre, which had the effect of opening her red light, involving a complete change of course. The President came to the conclusion, on the evidence, that the *Harvest Home* was really proceeding on an opposite course, coming up channel, and that, to persons who were properly looking out, her port light would have been visible quite as early as the supposed white stern light was said to have been visible—in fact, visible in plenty of time to enable them to take precautions which would have avoided the collision. He has found, therefore, that the *Harvest Home* was not to blame, but that the alternative case that the tugs were to blame was true, and he has held that the owners of the tugs were liable for the damage caused by the collision.

The owners of the tugs now appeal. They contend, or did contend, that upon the facts, rightly understood, the tugs were free from blame—that they had so manœuvred as in point of fact not to come within the range of the *Harvest Home*, and that they had not violated any rule which put upon them liability for this collision, which they had not in point of fact brought about. It has been pointed out, however, that the tugs did violate one of the collision regulations and cannot escape statutory liability, inasmuch as a collision with the tow has actually taken place. Therefore that part of the appeal which involves the question whether the tugs are to blame, wholly or in part, for the collision has been disposed of. Counsel for the appellants did not feel able successfully to contend against that point, and it follows, therefore, that the only question is whether both parties are to blame.

That brings us to the real point in the case—namely, whether the persons on the cutter ought by reasonable care to have avoided the collision. As I have said, the pilot cutter was lashed to the *Moy*, and taking the benefit of the tow. It was for the common purpose of both the pilot boat and the *Moy*. The pilot had to be there, and he had to have a boat, and it was an arrangement convenient to both parties. Therefore I do not treat it as purely a gratuitous tow. It seems to me, however, that the persons who accepted the tow in that way did not become emancipated from the duty of keeping a good look-out—a duty which they would have to perform if they were exclusively the vessel towed, and not lashed to the vessel which was in fact being towed. Therefore, if they have failed to take reasonable care, they must take the consequences. It seems to me that when we take the facts as found by the President, which are not now in dispute, this case comes down to a very simple point. The President has found that the tugs ought to have seen, and did see, if they had only taken proper pains to ascertain what they did see, the side-light of the *Harvest Home* in plenty of time to avoid the collision, and he attributes negligence to them in not keeping a good look-out. He says that she was lying there becalmed, and the wind sprang up, and she naturally moved on, and he adds: "I do not see any reason why she should not move on in those circumstances. If the other vessels had seen her at the distance at which they might have seen her, they undoubtedly could have kept out of her way; it was their duty to do so, they being steamers, or one steamer for the purpose of this case practically, and having perfect facilities for keeping out of the way of the schooner, and I think one ought to go a step further even than that, because, if they were coming down channel and saw, as I think they ought to have seen, the red light of this vessel at a considerable distance, then it was their very clear duty to keep out of her way, and the fact that they did not see her red light and saw a white light shews that there must have been a bad look-out on the part of those vessels and that they were completely under a mistake."

That finding in terms embraces the whole flotilla, not excluding this pilot boat. Even if it be limited to the two tugs, it seems to me that what could have been seen on one vessel could have been seen on the other, and seen in reasonable time to enable an attempt to be made to prevent a collision taking place. At the trial it was suggested, and evidence was given on the point, that it would have been a reasonable and proper thing for the pilot boat to have slipped the rope which attached her to the *Moy*. Now, it is really common ground, on the evidence, that it would have been a proper course to take, and the only reason why it was not taken that is suggested by the witnesses for the pilot boat is that they did not become aware of the danger in time to admit of their doing that which they all admit would have been a prudent thing to have done. There is a consensus of opinion on the part of the witnesses from the pilot boat that if they had only known of the danger a little earlier they might have avoided the collision by letting go. So the whole point comes to be at what time ought they to have seen this red light? On this point we have put two questions to our assessors. The first is this: "Accepting the relative courses, as found by the learned President, of the *Harvest Home* and the flotilla, ought those in charge of the *Emily* to have seen the red light of the *Harvest Home* in time to have slipped their rope, if they had thought fit to do so?" The answer we have received is: "There would have been time to have slipped the rope." The second question is as follows: "Would it have been a reasonable step for them to have taken?" The answer is: "It would have been reasonable to have slipped the rope." Those answers amount to a clear finding that the *Emily* is also to blame, and, therefore, to that extent this appeal succeeds. In arriving at that conclusion I do not think we are differing greatly from the view at which the learned President arrived. He seems to have accepted the other view with hesitation and reluctance. It is upon his own finding that I am mainly basing my judgment in this case—his own finding as to the time in which persons on the flotilla ought to have seen, and in fact, in his judgment, did see, the lights of the *Harvest Home*. The learned President seems, however, when he came to this point as to the time at which the rope might have been slipped, to have ignored, or not kept wholly in his mind, the considerable distance at which the light of the *Harvest Home* should have been seen and the time which must have elapsed before the emergency became critical, and it was too late to slip the rope. I am, therefore, of opinion that the *Emily* is also to blame, and that to that extent the appeal must be allowed.

MATHEW and COZENS-HARDY L.JJ. concurred.

May 4. On the question of the form of the order:—

Bailhache, for the appellants (defendants), owners of the tugs *Clarissa* and *Nora*. In the Court below the two tugs were held solely to blame for the collision between the *Harvest Home* and the *Emily*, with the result that the claim by the owners of the *Emily* against the owners of the *Harvest Home* was dismissed with costs, and the counter-claim of the owners of the *Harvest Home* against the tugs was pronounced for with costs, the counter-claim of the owners of the *Harvest Home* against the owners of the *Emily* being dismissed with costs. The owners of the tugs did not appeal from the judgment against them in favour of the *Harvest Home*, but they have been successful in their appeal against the *Emily*, and that pilot cutter has been found also to blame. It is submitted that the appellants, the owners of the tugs, are entitled to contribution in respect of the damage done to the *Harvest Home*, and also to the costs of the appeal.

D. Stephens, for the respondents (plaintiffs), owners of the pilot cutter *Emily* and her master and crew proceeding for their lost effects. The result of the decision in this Court is that the tugs and the pilot cutter are both to blame. There was no counter-claim by the tugs, and there is no contribution between joint tortfeasors. The question of the damage done to the *Harvest Home*, therefore, does not arise, and the decision in the Court below against the tugs as to the payment of the damage to the *Harvest Home* and the costs of the claim stands unaffected. The tugs are, under the Admiralty rule, liable for a moiety of the damage sustained by the pilot cutter, and neither party is entitled to any costs here or below.

[*The Morgengry and The Blackcock* (1) and Williams and Bruce's Admiralty Practice, 3rd ed. (1902), p. 95, were referred to.]

THE COURT held that the order as between the appellants, the owners of the tugs, and the respondents, the owners of the pilot cutter, had been rightly drawn up, for the question of contribution by the owners of the *Emily* in respect of the damage sustained by the *Harvest Home*—which the owners of the tugs were liable to pay—did not arise. On the question of costs, the owners of the tugs having appealed on the ground that they were free from blame and having been found partly to blame, each party must pay their own costs in the Court below and of this appeal.

Solicitors for appellants (defendants), owners of the *Clarissa* and *Nora*: *Stokes & Stokes, for Lloyd & Pratt, Cardiff.*

Solicitors for respondents (plaintiffs), owners of the *Emily*: *Holman, Birdwood & Co., for James Inskip & Co., Bristol.*

T. L. M.

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(1) [1900] P. 1.

SHEPPARD *v.* SHEPPARD.

1905
May 16, 17.

Divorce—Practice—Wife's Costs—Security—Previous Order for Separation—Effect—Matrimonial Causes Act, 1857 (20 *&* 21 *Vict. c.* 85), *s.* 26—*Summary Jurisdiction* (*Married Women*) *Act*, 1895 (58 *&* 59 *Vict. c.* 39), *s.* 5, *sub-s.* (*a*).

Notwithstanding the words of s. 26 of the Matrimonial Causes Act, 1857, and the construction placed thereon by the decision of the Court of Appeal in the case of *In re Wingfield & Blew*, [1904] 2 Ch. 665, the Divorce Court has power to direct a husband, whose wife has obtained a separation order against him, to find security for such costs of the wife as may be considered necessary to enable her to bring a suit for dissolution of marriage.

THIS was a summons adjourned into Court for further argument, in view of an application for leave to appeal.

In 1902 the wife, Elizabeth Sheppard, obtained, under the Summary Jurisdiction (Married Women) Act, 1895, against her husband William Sheppard, an order for separation and an allowance of 2*l.* a week.

In March, 1904, she presented a petition for the dissolution of her marriage on the grounds of adultery, cruelty, and desertion.

The husband filed an answer to that petition, denying the charges and counter-charging adultery.

In November, 1904, the wife's costs up to setting down were taxed at 22*l.* 14*s.* 3*d.*, and this sum was paid together with a sum of 30*l.*, which was paid into court, pursuant to the order of the registrar, for the estimated costs of the wife on the hearing of the suit.

In consequence of the case coming into the day's paper, and, from causes over which neither of the parties had any control, and also, as was alleged, in consequence of an amendment of the answer, the 30*l.* was found to be wholly inadequate, and an application was made on January 24, 1905, to the registrar to order a further sum of 150*l.* to be provided by the husband to meet the wife's costs of the hearing, but, the case of *In re*

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Wingfield & Blew (1) having been cited to him, the registrar refused the application, on the ground that the separation order constituted the wife a feme sole and that in view of the words of s. 26 of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), as interpreted by that decision, no order could be made. The wife appealed to the President in chambers, when his Lordship intimated that the registrar's view was erroneous, but, upon application being made for leave to appeal to the Court of Appeal, the summons was adjourned into Court for further argument.

Affidavits had to be filed on both sides, from which it appeared that proceedings had to be repeatedly taken to enforce payment of the allowance, and that at the date of the institution of the divorce suit the husband was actually in arrear. It was further alleged, but denied, that the wife had means apart from the allowance which had been ordered.

H. T. Kemp, K.C., and *F. P. Fausset*, for the petitioner. It is not a reasonable construction of the Acts that the wife, because she has obtained a separation order, is to have nothing beyond the 2*l.* weekly allowance if she desires to instruct a solicitor and bring a suit in this Court. *In re Wingfield & Blew* (1) is distinguishable, for there the party and party costs had been paid, and it cannot be intended to deprive this Court of the discretion which it has always exercised to order provision to be made for the wife's costs of suit.

[They also referred to *Turner* v. *Rookes*. (2)]

C. E. Jones, for the husband. The decision of the Court of Appeal in *In re Wingfield & Blew* (1) governs this case. *Turner* v. *Rookes* (2) was decided before the Act of 1857 came into operation, and no longer applies.

Cur. adv. vult.

SIR GORELL BARNES, PRESIDENT. In this case the registrar refused to tax the petitioner's further costs or to order further security to be given. An appeal was brought against that refusal, and the petitioner asked that an order should be made directing the registrar to tax and to order further security to be given.

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(1) [1904] 2 Ch. 665.

(2) (1839) 10 Ad. & E. 47; 50 R. R. 320.

The matter came before me in chambers, and at the time when it was heard by me leave to appeal against the view I then expressed was applied for.

I thought the matter of sufficient moment to be considered in Court, and the summons has, therefore, been treated as adjourned into Court for rehearing.

The petitioner is the wife, and in March, 1904, she filed a petition for dissolution of marriage on the grounds of cruelty, desertion, and adultery. Before the suit was instituted she had obtained, on February 20, 1902, a separation order from two justices of the peace for the petty sessional division of Brentford, on the ground of her husband's desertion, and the husband was ordered to pay, for the use of his said wife, to the clerk to the justices, at the police court, Brentford, the weekly sum of 2*l.*

An answer to the petition was put in, but nothing turns upon that answer so far as the present point is concerned, though no doubt it was the cause of part of the extra expense to which the petitioner was put.

On November 1, 1904, an order was made for security of the petitioner's costs, and by that order the respondent was directed to pay to the petitioner's solicitors 22*l.* 14*s.* 3*d.*, and to secure a further sum of 30*l.*

The case then came into a position in which it was almost coming on, but, owing to the exigencies of the business of the Courts, because I had to go to the Court of Appeal, it had to stand over, and thus it was considered that the security already ordered was not adequate to bring the case of the wife on for trial when it was again ready.

Application was thereupon made to the registrar to increase the amount of security, but the registrar refused to do so: hence this appeal.

The ground for the registrar's refusal was that he considered himself bound by the decision of the Court of Appeal in *In re Wingfield & Blew.* (1)

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(1) [1904] 2 Ch. 665.

Naturally enough the matter was brought before me to see whether the wife is not entitled to such costs as are necessary to enable her to fight her case properly, and the question raised has now been fully argued.

The point made on the part of the husband is based upon s. 26 of the Matrimonial Causes, Act, 1857 (1), together with the decision I have referred to.

It is contended on the part of the husband that the wife, having got a separation order, which, under the Summary Jurisdiction (Married Women) Act, 1895 (2), is practically a judicial separation, she was and is now, to be considered as a feme sole, and therefore cannot obtain any security from her husband for the costs of the litigation, which, from her point of view, has been brought about by her husband's conduct. Whatever the truth may be, the case has yet to be tried.

The argument on the part of the husband is that effect has been given by the registrar to the sections referred to.

It is necessary to examine the decision in *Wingfield & Blew's Case* (3) with some care. It dealt with several points, but the only one material here is, I think, called the third point.

The husband and wife in that case were married in 1888, and on October 30, 1901, the husband presented a petition for a divorce. The wife retained Messrs. Wingfield & Blew to act for her, and an order for interim alimony was obtained. In the result the petition was dismissed with costs, and a judicial separation was granted to the wife as prayed in her answer. In July, 1902, the husband presented a second petition for divorce. The wife applied for permanent alimony, but the application was resisted on the ground that a second petition was pending, and on appeal to the judge he declined to interfere. The second divorce petition was afterwards dismissed with costs.

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(1) 20 & 21 Vict. c. 85, s. 26, is as follows: "In every case of a judicial separation the wife shall, whilst so separated, be considered as a feme sole for the purposes of contract, and wrongs and injuries, and suing and being sued in any civil proceeding: and her husband shall not be liable in respect of any engagement or contract she may have entered into, or for any wrongful act or omission by her, or for any costs she may incur as plaintiff or defendant: Provided that where, upon any such judicial separation alimony has been decreed or ordered to be paid to the wife, and the same shall not be duly paid by the husband, he shall be liable for necessaries supplied for her use: Provided also, that nothing shall prevent the wife from joining, at any time during such separation, in the exercise of any joint power given to herself and her husband."

(2) 58 & 59 Vict. c. 39, s. 5, is as follows: "The Court of summary jurisdiction to which any application under this Act is made may make an order or orders containing all or any of the provisions following, viz.:—

"(*a*) A provision that the applicant be no longer bound to cohabit with her husband (which provision while in force shall have the effect in all respects of a decree of judicial separation on the ground of cruelty."

(3) [1904] 2 Ch. 665.

Then her solicitors presented to the husband a bill containing three bills of costs. The first related to the divorce proceedings, including both the petitions and the alimony proceedings; the second, to an action for detinue; and the third related to a small matter of little or no importance.

The party and party costs had already been paid by the husband. The claim made by the bills of costs was in respect of the difference between party and party and solicitor and client costs.

In July, 1903, the solicitors obtained the ordinary order as of course for taxation, and the question was raised whether the husband was in any way liable. Warrington J. held that he was liable, but his decision was reversed on appeal.

The ground on which it was reversed is shortly stated in the judgment of Vaughan Williams L.J., who said (1): "In my opinion the effect of that section (s. 26) is in every case of a judicial separation absolutely to do away with the right of the wife to pledge her husband's credit whilst she is so separated, and I think that it is not possible to limit that by saying that she is to have a right to pledge his credit in respect of some necessaries which become necessaries by reason of the husband's conduct towards her, as, for instance, by reason of his commencing proceedings for a dissolution of marriage."

The other Lords Justices gave judgment substantially to the same effect. Their decision amounts to this—that when a wife has been placed in a position in which she is to be considered as a feme sole—whether by a decree of judicial separation, or

(1) [1904] 2 Ch. at p. 678.

by what is practically equivalent to it, namely, an order for separation under the Summary Jurisdiction (Married Women) Act, 1895—she cannot pledge her husband's credit for any necessaries so long as he properly and duly pays any alimony which has been decreed or ordered to be paid by him; and they then say that the necessaries in question, namely, the extra costs as between solicitor and client in the two divorce suits, were not incurred upon the credit of the husband because of the section in the Matrimonial Causes Act previously referred to.

The argument before me in the present case proceeds on the same lines, and it is contended that no security for the costs of the present petitioner in her suit against her husband can be ordered.

Two points arise: the first, whether the decision in *Wingfield & Blew's Case* (1) governs the application now before me; and, secondly, whether the proviso in the section of the Act of 1857 has been complied with, and, if not, what is the result of such non-compliance.

With regard to the first point, in my judgment the decision of the Court of Appeal does not govern the present question, which arises out of an application to the Court to secure to the wife, in the exercise of its discretion, the costs necessary for her to bring her suit to a hearing. It is immaterial whether the suit is by her or against her. In either case the practice has been that the wife shall be placed in a position to fight her case by her husband, who is the only person in the ordinary circumstances of life who can be called upon to find the money for the wife's contest. The objection put forward to the present application is, in effect, to say that the recognised practice is not to be followed by reason of the decision of the Court of Appeal in the case cited. That is, to my mind, an erroneous objection and a wrong view. That decision does not touch the present question, because this is a question of the exercise of discretion. It is true that the discretion and the way in which it is exercised originates in the fact that a wife has, at common law, a right to pledge her husband's credit for

(1) [1904] 2 Ch. 665.

necessaries; but that is only in part the foundation for the way in which this Court exercises its discretion in cases such as this, the real point being that it is impossible to do justice if a woman who is attacked cannot put the Court in possession of all the facts, and fight her case and deal with it properly, unless she has funds to do it. And this is equally true in a case where the wife wishes to have relief on the ground of her husband's misconduct.

That this does not rest solely on common law principles may be illustrated by the fact that it applies in cases where the woman is not really the wife, as, for instance, where it is alleged that there has been a bigamous marriage. In cases of that kind, where the woman is not the wife, no decree of this Court has any operative effect. It does not make her a wife or make her not a wife: it merely records the fact that she is not the wife; and, in strictness, there is in such cases no necessity for a suit for nullity, but it is a matter of great importance and convenience to place the fact on record. Such cases are on a different footing to suits for nullity on the ground of impotence. In the cases where there was no marriage the woman was not a wife, and therefore, as wife, she could not pledge the man's credit; and yet this Court will allot to her adequate funds to contest the suit, although she is alleged to be and may ultimately be proved to have been not the wife of the man.

That is the way in which this Court has been accustomed to act, and I cannot bring myself to think that the Court of Appeal had any idea of interfering with this practice, or that their decision is to be taken as treating that practice as overruled. Others besides the parties may be affected by a decree of divorce: children may be, and the public are concerned in these questions of status. In divorce cases, justice could hardly be done if the wife without any means is not provided by the husband with means to contest the case.

If it is to be so treated, it is to my mind a very serious matter indeed. Separation orders are frequently obtained in Courts of summary jurisdiction, and it is not uncommon that a husband against whom such an order has been obtained afterwards places himself in such a position as to give the wife ground for divorce. In nearly all such cases the woman is exceedingly poor, and has, in fact, nothing whatever to live upon except the allowance ordered by the magistrates. If the effect of the decision of the Court of Appeal is to be that she can no longer be put in a position to bring a suit for dissolution of her marriage, the result would be most serious. So it would be if, after a separation order against a husband, he were to make a charge of adultery against his wife and sue for a divorce, which he could do as the order is not a bar, and she should be possessed of no means to defend herself from what might be a false charge, and were not to be provided with means by him to defend herself. I do not think this can have been contemplated by the Court of Appeal, and in the view I take I am of opinion that this Court can still say that a wife shall be put, by means of security to be furnished by her husband, in such a position as will enable her to bring her case properly before the Court.

The decision in question was simply as to solicitor and client costs. It may be that it would touch a claim by a solicitor against a husband for party and party costs; but it does not affect the power of this Court to order security to be given by the husband for the costs of his wife.

I feel myself, of course, completely bound by any decision of the Court of Appeal, though I cannot help saying, after the full discussion we have had in this present case, that a judgment on the lines of that given by Warrington J. (1) would more nearly meet the difficulties likely to be encountered in this Court than the decision of the Court of Appeal. The Court of Appeal have thought the words of the section so strong as to cover the case before them, but I am not sure that the effect of some parts of the section was sufficiently drawn to the attention of the Lords Justices, more particularly the point I refer to later on.

This brings me to the second point. It is said that the proviso in the section makes an end of the difficulty in the present case. An affidavit has been filed which shews that the husband in this case was continually in default in payment of the allowance ordered by the magistrates, and that various proceedings were taken against him on ten or twelve occasions to enforce payment. The affidavit states that at the date of the institution of the present suit by the wife he was three weeks in arrear. It is, therefore, obvious that the proviso in the section had not been complied with, and therefore the section becomes inoperative.

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(1) [1904] 2 Ch. at pp. 670–674.

The point I think it worth while to notice in connection with this matter is that according to the construction placed on the words of the section by the Court of Appeal this result would appear to follow—that although it is quite obvious that the allowance decreed or ordered to be paid is for the maintenance of the wife, and therefore, if default is made in payment of it, logically it is only such things as are for her own maintenance that she ought to be entitled to obtain on the credit of her husband, yet such default would seem to confer upon the wife a right to obtain necessaries not contemplated by the order for alimony, and to let in a claim for such costs as were the subject of discussion and decision in *Wingfield & Blew's Case.* (1) This seems to me to be illogical.

Both on the question of law and on the question of fact I hold that this Court is not fettered by that decision.

I direct that this case shall go back to the registrar to inquire what further security shall be given by the husband for the costs of the wife. The costs of and incidental to this application must be taxed and paid by the husband.

I think the case is of sufficient importance to give leave to appeal, on condition, however, that a sum of fifteen guineas be provided by the husband to enable the wife to fight the question on the appeal. That sum is to be found within a fortnight as a condition of leave to appeal. The trial of the suit is not to be delayed.

Solicitors for petitioner: *Charles Robinson & Co.*
Solicitors for respondent: *Charles C. Sharman.*

H. D. G.

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(1) [1904] 2 Ch. 665.

1905
May 18, 19.

STONE *v.* HOSKINS.

Probate—Mutual Wills—Fresh Will made by Party who predeceases the other—Notice on Death—No Relief to Survivor.

Where two persons have made an arrangement as to the disposal of their property and executed mutual wills in pursuance of that arrangement, the one of them who predeceases the other dies with the implied promise of the survivor that the arrangement shall hold good; and if the survivor, after taking a benefit under the arrangement, alters his will, his personal representative takes the property upon trust to perform the contract, for the will of the one who has died first has, by the death, become irrevocable. But, on the contrary, where the one who dies first has departed from the bargain by executing a fresh will revoking the former one, the survivor, who has, on the death of the other party to the arrangement, notice of the alteration, cannot claim to have the later will of the deceased set aside or modified, either by way of declaration of trust or otherwise.

The plaintiffs, as executors, claimed probate of a will, dated February 1, 1904, of Emily Hoskins, who died on March 3, 1904.

The defendant, who was the husband of the testatrix, propounded an earlier will, dated November 21, 1900, and alleged that, both before and after the marriage, he and his wife agreed to make mutual wills, and that this agreement or arrangement was carried into effect on November 21, 1900; and he further alleged that the testatrix secretly and without notice to him and contrary to the said arrangement purported to revoke her said will and to make a fresh one. He counter-claimed that the Court should pronounce against the fresh will, and, alternatively, that the executors of the later will, if the same were admitted to probate, should be directed to hold the property of the testatrix in trust for the persons benefited under the earlier will. The substance of the case which he intended to set up was stated to be that the testatrix, without notice to him, had attempted to depart from the bargain which had been carried out by the mutual wills, and had purported to make wills both on June 29, 1901, and on June 24, 1902.

The plaintiffs, in their reply, denied any agreement or arrangement, and said that the defendant had no cause of action, as the testatrix had received no benefit under the mutual wills.

[No question of law arose upon the plea of testamentary incapacity.]

The evidence shewed, in effect, that there had been an agreement or arrangement, and that the mutual wills had resulted therefrom, and the husband left all his property to his wife, while the testatrix had thereby left all her property, except 50*l.*, to her husband, the defendant. Her subsequent wills, of which the defendant had no knowledge but only a suspicion, progressively reduced the benefits to him.

Barnard, for the defendant. The marriage, after the contract to make mutual wills, and the execution of those wills after the marriage, creates a trust: *Dufour* v. *Pereira*. (1) Neither party could alter his or her will without the consent of or notice to the other party.

Bankes, K.C., and *R. H. Pritchard*, for the plaintiffs. Where one party to such a contract dies and the compact has been acted on and advantage taken of it by the survivor, there may be authority for saying that a Court of Equity will not allow the survivor to alter the compact. But this case is different, because the arrangement was that these two persons should execute instruments which, in their very nature, are revocable. An agreement to make a will is not an agreement not to revoke it: *Hobson* v. *Blackburn* (2); *Walpole* (*Lord*) v. *Orford* (*Lord*). (3)

Rayden, for Mrs. Bastone, a beneficiary under the later wills of the testatrix.

SIR GORELL BARNES, PRESIDENT, after reviewing the facts and pleadings and stating his conclusion that the last will, propounded by the plaintiffs, was validly executed, continued:—There remains a legal point of considerable interest. These were no doubt mutual wills made in accordance with an arrangement. The testatrix departed from that arrangement and shortly afterwards died, the husband not hearing of that departure till after her death; and he now claims that in the event, which happened, of my pronouncing for the will, the executors of it should hold the property passing under it on the trusts of the arrangement.

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(1) (1769) 1 Dick. 419.

(2) (1822) 1 Add. 274.

(3) (1797) 3 Ves. 402, 418; 4 R. R. 38.

The contention of the defendant is this—that as there was this arrangement prior to the marriage, and it has been carried out by the wills of 1900, and he has not departed from the arrangement on his part, he ought to have a declaration that matters still stand on the basis of the arrangement. On the other hand the point is made that the arrangement contemplated by its very nature a power to revoke it in certain circumstances, i.e., that it is not of the character of a settlement, and the fact that it was to be carried out by making wills indicates its revocability. Unless the deceased died standing by her will, so to speak, she could depart from the arrangement by her husband's consent or notice given to him. It is, I know, objected here that notice was not given.

This brings me to the consideration of such authority as there is on the point. I am indebted to Mr. Rayden for the reference to Hargrave's Juridical Arguments, vol ii. p. 304, where that very learned lawyer, in his elaborate opinion on the Walpole case (*Walpole* (*Lord*) v. *Orford* (*Lord*)) (1), sets out at much greater length than the report in 1 Dickens the judgment of Lord Camden in *Dufour* v. *Pereira*. (2) The case before me has been discussed on the lines there indicated. There it is said as follows: "A mutual will is a revocable act. It may be revoked by joint consent clearly. By one only, if he give notice, I can admit. But to affirm that the survivor (who has deluded his partner into this will upon the faith and persuasion that he would perform his part) may legally recall his contract either secretly during the joint lives or after at his pleasure, I cannot allow" . . . . "If not revoked during the joint lives by any open act, he that dies first dies with the promise of the survivor that the joint will shall stand. It is too late afterwards for the survivor to change his mind, because the first dier's will is then irrevocable, which would otherwise have

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(1) 3 Ves. 402; 4 R. R. 38.

(2) 1 Dick. 419.

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been differently framed if that testator had been apprized of this dissent." . . . . "Though a will is always revocable, and the last must always be the testator's will; yet a man may so bind his assets by agreement that his will shall be a trustee for performance of his agreement." . . . . "These cases are common, and there is no difference between promising to make a will in such a form and making his will with a promise not to revoke it. This Court does not set aside the will; but makes the devisee heir or executor trustee to perform the contract."

It appears to me that the result is tolerably plain. If these two people had made wills which were standing at the death of the first to die, and the survivor had taken a benefit by that death, the view is perfectly well founded that the survivor cannot depart from the arrangement on his part, because, by the death of the other party, the will of that party and the arrangement have become irrevocable; but that case is entirely different from the present, where the first person to die has not stood by the bargain and her "mutual" will has in consequence not become irrevocable. The only object of notice is to enable the other party to the bargain to alter his or her will also, but the survivor in the present case is not in any way prejudiced. He has notice as from the death. I cannot see that the cases cited support the proposition for which the defendant contends, with the result that he must, I think, fail to obtain the declaration which he seeks. I pronounce for the will of 1904.

Solicitors for plaintiffs and for Mrs. Bastone: *Taylor, Hoare & Pilcher, for J. & S. P. Pope, Exeter.*

Solicitors for defendant: *H. Tyrrell & Son, for James Beal, Exeter.*

H. D. G.

C. A.

1905

March 8.

[IN THE COURT OF APPEAL.]

THE CHALLENGE AND DUC D'AUMALE.

Admiralty—Collision — Tug and Tow — Fog — Regulations for Preventing Collisions at Sea, 1897, *art.* 16—*Obligation on Tug to stop—Control of Tug by Tow.*

A steamship proceeding in a dense fog up the English Channel at a moderate speed on a course of E. ½ N. stopped her engines, in accordance with the second paragraph of art. 16 of the Regulations for Preventing Collisions at Sea, on hearing a fog signal apparently forward of her beam, and on hearing a second signal reversed; but she came into collision with a sailing vessel in tow of a tug proceeding on a crossing course of W.S.W. at a moderate speed of from two to three knots. The whistle of the steamship had been heard fine on the starboard bow of the sailing vessel; but the engines of the tug were not stopped in accordance with the above regulation, on the ground that as the tug was proceeding at the minimum speed compatible with keeping the tow under control, it was not the duty of the tug to stop:—

Held, by the Court of Appeal (Collins M.R., Mathew and Cozens-Hardy L.JJ., assisted by nautical assessors), affirming the decision of Gorell Barnes J., [1904] P. 41, that the steamship was not to blame as she had complied with the rule by stopping, and was not bound to reverse before she did so; but that both tug and tow were to blame, as it was practicable for the tug to have stopped her engines and let the way run off the tow.

APPEAL by defendants, La Compagnie Maritime Française, owners of the *Duc d'Aumale*, and the Elliott Steam-tug Company, Limited, owners of the *Challenge*, from a judgment of Gorell Barnes J., in an action of damage by collision, in favour of the plaintiffs, the Marychurch Steamship Company, Limited, owners of the *Camrose*.

The report in the Court below (1) deals with the question of the application of the second paragraph of art. 16 of the Regulations for Preventing Collisions at Sea, 1897 (2), to the case of a tug incumbered with a tow, as well as with the question of estoppel by reason of proceedings in one foreign country to enforce a judgment by default in another foreign country relating to the same subject-matter as the action in this country; but the appeal was limited to the first question only.

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(1) *The Challenge and Duc d'Aumale*, [1904] P. 41. The case had also been before the Court on an unsuccessful application by the owners of the *Duc d'Aumale* to set aside service upon them out of the jurisdiction of notice of a concurrent writ: *The Duc d'Aumale*, [1903] P. 18.

(2) Art. 16: . . . . "A steam vessel hearing, apparently forward of her beam, the fog-signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over."

On June 22, 1902, about 7.45 A.M., the British screw steamship *Camrose*, of 2565 tons gross register, from Ibrail to Antwerp with a cargo of grain, was in the English Channel between the Royal Sovereign Lightship and Dungeness. The wind was westerly light, the tide was the first of the flood, and there was a dense fog. The *Camrose* was proceeding on a course E. ½ N. magnetic, making 2 to 2½ knots with engines working dead slow, and her whistle was being sounded a prolonged blast, when those in charge heard the fog signal prescribed by art. 15 (*e*) of the Regulations for Preventing Collisions at Sea, namely, a prolonged blast followed by two short blasts (1), apparently about two points on the port bow and a good distance off. The engines of the *Camrose* were stopped, and her whistle sounded a prolonged blast in reply. Shortly afterwards the helm was ported; but, before the order could be effectively carried out, the prolonged blast followed by two short blasts were again heard apparently more ahead, and at the same time a vessel came in sight distant between one and two ships' lengths, and bearing about a point on the starboard bow. The engines of the *Camrose* were immediately put full speed astern, and a sailing vessel which the first vessel was towing coming into sight between one and two ships' lengths off, and bearing about a point or a point and a half on the port bow of the *Camrose*, the helm was put hard-a-starboard; but the stem and starboard bow of the *Camrose* struck the tow about amidships, both vessels sustaining considerable damage. The tug and tow proved to be the *Challenge*—a British screw steam-tug of 14 tons net register—towing the *Duc d'Aumale*, a steel four-masted French barque of 2297 tons gross register, from London to San Francisco viâ Cherbourg, with a part cargo of cement and other goods.

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(1) Art. 15: "(*e*) A vessel when towing . . . . shall, instead of the signals prescribed in sub-divisions (*a*) and (*c*) of this article, at intervals of not more than two minutes, sound three blasts in succession, viz., one prolonged blast followed by two short blasts . . . ."

By their defence the owners of the *Challenge* alleged that their vessel, with about eighty fathoms out to her tow, was heading about W.S.W. magnetic, making about two knots, and duly sounding her whistle, when those on board saw the loom of a steamship which proved to be the *Camrose* coming from the westward from two to three points on the starboard bow, and about two cables' length distant, that the whistle of the tug was again sounded and that her engines were then stopped; but, at the trial, the learned judge came to the conclusion on the evidence that the whistle of the *Camrose* was heard twice before anything was done with the engines.

The owners of the *Duc d'Aumale* by their defence alleged that their vessel, in tow of the tug, was proceeding on a course S. 50 deg. W. true (about W.S.W. magnetic) "at the minimum of speed compatible with keeping her under control—viz., about two knots," and that when "the whistle of a steamship was heard by those on board on the starboard bow the *Duc d'Aumale* was kept on her course, and the whistle of the tug continued to be sounded one long and two short blasts at proper intervals. Soon afterwards the whistle was again heard, and after a short interval a steamship which proved to be the *Camrose* came in sight two to three points on the starboard bow of the *Duc d'Aumale* and about a quarter of a mile distant approaching at a high rate of speed. As the *Camrose* continued to head for the *Duc d'Aumale*, and a collision appeared to be imminent, the helm of the *Duc d'Aumale* was first starboarded and afterwards ported to ease the blow; but before the heading of the *Duc d'Aumale* was materially altered" the collision occurred.

The plaintiffs, the owners of the *Camrose*, charged the defendants, inter alia, with excessive speed, failing to keep out of the way, failing to slacken, or stop, or reverse, attempting to cross ahead, and improper starboarding.

The defendants, the owners of the *Challenge*, charged the plaintiffs with, inter alia, failing to keep clear of the *Duc d'Aumale*, improper porting, excessive speed, and failing to reverse the engines in due time; whilst the defendants, the owners of the *Duc d'Aumale*, further charged the plaintiffs that "Those on board the *Camrose* having heard apparently forward of the beam the fog signal of a vessel unable to manœuvre as required by the Rules for Preventing Collisions at Sea, and the position of which was not ascertained, improperly failed to stop the engines and then to navigate with caution until the danger of collision was over."

The master of the *Duc d'Aumale*, who was examined on commission through an interpreter, in cross-examination said that when he heard the whistle of the steamer apparently about a mile away, forward of the beam, he did not give any order to the tug to stop her engines "because neither of the vessels would then have been under command of their helms; the tow-line in dragging in the water in a bight would have prevented both vessels from answering their helms at the speed (two to three knots) they were going"; and when asked whether it was his view that a sailing vessel in tow of a tug is not bound by the rules of navigation to get out of the way of a crossing ship on the starboard side, he answered that in his opinion "a vessel in tow in no case must get out of the way of a steamship . . . . It was for her (the *Camrose*) to get out of the way, not for us . . . . If it had been for us to get out of the way we could have avoided her—that is to say, by manœuvring (1) immediately we saw her."

The learned judge in the Court below (Gorell Barnes J.) found that the charges of excessive speed and of improper helm action failed, for both the plaintiffs' and the defendants' vessels were going at a moderate speed, and the alleged improper helm action had no material effect; but the learned judge distinguished the case of *The Merthyr* (2), and gave judgment in favour of the plaintiffs, on the ground that the *Camrose* was not to blame as she had complied with art. 16 of the Regulations for Preventing Collisions at Sea by stopping, and was not bound to reverse before she did so; whilst the tug

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(1) The return as furnished to the Court reads "*in* manœuvring," which appears to be a mistranslation of "en manœuvrant": at all events it makes no sense in English.—F. P.

(2) (1898) 8 Asp. M. L. C. 475.

Challenge, and the sailing ship in tow, the *Duc d'Aumale*, were to blame as, distinguishing *The Lord Bangor* (1), it was practicable for the tug to have at once stopped her engines and let the way run off the tow.

Carver, K.C., and *Lewis Noad*, for appellants (defendants), owners of the *Duc d'Aumale*.

Aspinall, K.C., and *Lauriston Batten*, for appellants (defendants), owners of the *Challenge*.

The arguments of counsel were the same as in the Court below, and sufficiently appear from the judgments. On the question that the *Camrose* ought to have reversed at once as well as stopped, the case of *The Merthyr* (2) was relied on by counsel for the appellants, and the case of *The Lord Bangor* (1) was pressed upon the attention of the Court in support of the view that a tug incumbered with a tow, in such circumstances as those arising in this case, is not required to stop her engines.

Laing, K.C., and *Balloch*, for respondents (plaintiffs), owners of the *Camrose*, were not called upon.

Collins M.R. In this case the plaintiffs' steamship *Camrose* was proceeding up the English Channel, and the defendants' sailing ship *Duc d'Aumale*, in tow of the defendants' tug *Challenge*, was proceeding down the channel on practically opposite courses. The weather was thick with fog, and the *Camrose*, hearing a fog signal upon her port bow, stopped, and, it is alleged against her, ported her helm. When the tug and her tow came into sight the *Camrose* reversed and starboarded. It is now further urged against her that she ought to have reversed before, and that the non-reversal led to the collision; but the second paragraph of art. 16 of the Regulations for Preventing Collisions at Sea only requires that "a steam vessel hearing apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines."

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(1) [1896] P. 28.

(2) 8 Asp. M. L. C. 475.

C. A.
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So that there is clearly no obligation imposed by the rule to reverse. She did stop, and the learned judge has found—and he had the concurrence of the Elder Brethren—that as far as the circumstances of the case admitted she navigated with caution.

With regard to the porting of the helm, upon which counsel for the appellants strongly relied as having been, as well as the starboarding, wrong manœuvres on the part of the *Camrose*, it is to be observed that, though the porting and starboarding did take place, the learned judge came to the conclusion that they had no practical effect upon the collision. The starboarding followed so closely upon the porting that, even if either of them or both of them were wrong, they had no effect upon bringing about the collision, because the collision was practically inevitable. The vessels were so close to each other at the time the alleged alteration took place that no substantial difference was made by it. That was a question of fact for the learned judge on the evidence. There was a theory put forth on the part of the appellants that the entries in the log shewed that interpolations had been made, and that there was a great discrepancy. That raised a perfectly clear question of fact for the learned judge, who had the witnesses before him, and had also carefully examined these documents, and he came to the conclusion, in which I entirely concur, that there is no reason for inferring that the criticisms made on the additions and alterations in the entries in the log shake the testimony that these movements of the helm had really any appreciable effect upon the direction of the vessels. Now, if that is so, it cuts away one main ground of the appeal. I agree with the learned judge's view on that part of the case.

In respect of the alleged omission on the part of the *Camrose* to reverse, I have already said that the rule does not prescribe reversing as well as stopping. The evidence is that the signal first heard led the master of the *Camrose* to suppose that the approaching vessel, which he gathered from the signal was a tug with a tow, was on his port bow. That he did know, but he did not know in what direction they were coming, whether crossing him or whether coming to meet him on the port side.

His impression was that they were coming to meet him on his port bow. If he was right in that surmise that they were approaching him from the opposite direction and on his port side, his view was that to have reversed would have had the effect of bringing his stern possibly across the course of the vessels meeting him and on his port side. There is no doubt, and it is admitted by counsel for the owners of the *Challenge*, that the tendency of a right-handed screw would be to throw the bow to starboard and the stern to port. At all events it would have been taking a course which, when he was in ignorance of the whereabouts and as to what course the vessel nearing him was taking, he thought in the circumstances was dangerous. Therefore to insist upon his affirmatively taking a course which might be a wrong one, where the conditions are wholly unknown to him, except that there is a vessel in his neighbourhood the position of which he does not know, is, I think, requiring him to do something which, under the circumstances at the time, was not only a course he was not called upon to take, but which might reasonably appear to him to be an imprudent course. What he did was to stop and navigate with caution, and it was not until a very short time later on that these two vessels loomed through the fog, and he saw that the tug was on the starboard and the tow on his port hand. He then reversed and did all he could to avoid a collision, unsuccessfully.

The learned judge held that the conduct of the tug in not stopping was wrong, and on that ground the plaintiffs having done nothing wrong, and the defendants having done something wrong, he found in favour of the plaintiffs, the owners of the *Camrose*. With respect to the question whether the learned judge was right or not in holding that the tug had done wrong, we have had an argument from counsel for both the *Duc d'Aumale* and the *Challenge*. They have contended that a tug with a tow is put in a totally different position from a steam vessel, so as to be relieved from the obligation imposed by the second paragraph of art. 16. They say that, having regard to the special relation between the tug and the tow, the tug could not be called upon to stop her engines, because it would involve the possibility of the tow running up to her with the probable consequence that the rope would foul the screw of the tug, and other complications might arise. However, the learned judge, with the advice of the Elder Brethren who were assisting him, came to the conclusion which he formulated in his judgment on that part of the case as follows: "The Elder Brethren advise me that, in this case, the tug could have stopped without encountering any difficulty with regard to her tow, sufficiently to let the way run off the tow—that the circumstances which I have described admitted of this being done, and in the position of the vessels it would have been proper seamanship to do so." We have taken the opinion of our skilled assessors on that point, and they have given an opinion which substantially accords with that of the Elder Brethren below, upon which the learned judge acted. Therefore, upon all these grounds it seems to me that the learned judge was perfectly right, and that the appeal fails.

MATHEW L.J. I am of the same opinion. The question turns on art. 16, which is applicable to both vessels—the *Camrose* on the one hand and the tug *Challenge* on the other. The *Camrose* complied with the conditions of the article, the tug did not. The excuse that was offered for the tug was that she could not, and that, when a tug was towing a vessel, she was not bound to stop and could not stop, and that it was not proper seamanship to do so. The nautical assessors in the Court below and here concur in saying that the rule might have been complied with by the tug, and therefore it follows that the judgment must be affirmed.

COZENS-HARDY L.J. I agree.

Appeal dismissed.

Solicitors for appellants (defendants), owners of the *Duc d'Aumale*: *William A. Crump & Son.*

Solicitors for appellants (defendants), owners of the *Challenge*: *Williamson, Hill & Co.*, for *R. & R. F. Kidd*, North Shields.

Solicitors for respondents (plaintiffs), owners of the *Camrose*: *Thomas Cooper & Co.*

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[IN THE COURT OF APPEAL.]

THE MINNETONKA.

Admiralty—Collision—Damage—Freight—Abandonment of Voyage—Claim by Cargo Owner—" Substituted Expense."

A collier from the Tyne to Cape Town, under charter to the Admiralty, came into collision with a steamship in the English Channel and put back to the Thames for repairs. The cargo of coals had to be discharged, and, by arrangement between the Admiralty, as the owners of the cargo, and the owners of the collier, the voyage was treated as abandoned, the cargo sold, and a sum of 1000*l.* agreed to be paid by the Admiralty to the owners of the collier as a "substituted expense" in lieu of the larger sum which, it was estimated, would have been incurred for storage and reshipment if the collier had carried on the coals at the end of the period required for repairs.

At the usual ships' reference, after a decree of both to blame, a moiety of the claim by the owners of the collier for repairs and detention was paid by the owners of the steamship; but, at a reference between the Admiralty and the owners of the steamship, a claim, made by the Admiralty against the owners of the steamship for a moiety of their adjusted proportion of the 1000*l.*, was disallowed by the registrar, and the disallowance affirmed on appeal to the judge, [1904] P. 202.

Held, by the Court of Appeal (Collins M.R., Mathew and Cozens-Hardy L.JJ.), reversing the decision of Bucknill J., that the amount claimed by way of "substituted expense" was the result of a reasonable arrangement to minimise the loss, and was such a consequence of the collision as to render the owners of the steamship, as wrong-doers, liable for a moiety of their adjusted proportion.

The Marpessa, [1891] P. 403, considered.

Appeal by plaintiffs, the Commissioners for executing the office of Lord High Admiral of the United Kingdom of Great Britain and Ireland, owners of cargo laden on board the steamship *Uskmoor*, against a decision of Bucknill J., in favour of the defendants, the owners of the *Minnetonka*.

The case is fully reported in the Court below. (1) The facts, shortly stated, were as follows:—

On May 15, 1902, the Admiralty chartered the *Uskmoor*, a steamship of 3587 tons gross register, to carry a cargo of about 4460 tons of coal from the Tyne to Cape Town, the owners of the vessel to receive one-third of the freight of 16*s.* per ton, if required, less 3 per cent., by draft at three days' sight upon the Accountant-General of the Navy on signing bills of lading.

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(1) *The Minnetonka*, [1904] P. 202.

In pursuance of this charter the *Uskmoor* was, on June 9, proceeding down the English Channel when she came into collision off Beachy Head, with the steamship *Minnetonka*, and was so seriously damaged that she had to put back to the Thames. On her arrival there, on June 11, the surveyor for her owners reported that it would be necessary to dry-dock the vessel, and, for that purpose, to discharge the whole of the cargo. On the same day the managing owners of the vessel by letter informed the Director of Navy Contracts of the opinion of the surveyor, and added that it was estimated that the repairs would take about six weeks. To this letter the Director of Navy Contracts replied that "it would be necessary to consider the advisability of selling the coal and considering the voyage terminated, so as to avoid the expense of storage and reshipping." On June 13 the managing owners wrote, giving particulars of the probable cost of discharging, storing, and reshipping the cargo, and adding that "the owners are quite prepared to carry out the voyage and earn their freight when the repairs are completed; but if you wish to terminate the voyage now . . . . (the owners) would do so for the consideration of 7*s.* 6*d.* per ton as full freight." This would have amounted to about 1672*l.*; but on June 17 the Admiralty surveyor wrote to the Director of Navy Contracts that the managing owners would now accept 1000*l.* in respect of the freight, which is a trifle more than the average adjusters had advised, and adding, "All that is wanted now from you is a letter to" (the managing owners) "stating that you offer them 1000*l.* in respect of the freight, and stating that you will give them another cargo to replace the present one at the 16*s.* rate, or more if freights should rise."

On the same day the average adjusters wrote to the Director of Navy Contracts that the salvage association, representing the underwriters on steamer, had agreed to the proposal "to terminate the voyage and pay the shipowners 4*s.* 6*d.* per ton, which amount is to be apportioned as a substituted expense over all interests of ship, cargo, and freight." On June 18 the Director of Navy Contracts wrote to the managing owners that "to minimise loss in the interests of all concerned the Admiralty is prepared to agree to the following arrangement, to which it is understood that you and the underwriters have given your concurrence, viz., the voyage to be terminated and the coal sold, the owners to be paid the sum of 1000*l.*, to be apportioned as a substituted expense in lieu of those which would otherwise have been incurred." Further correspondence followed, and, in the result, the Admiralty, in consideration of the voyage being abandoned, agreed to pay the shipowner 4*s.* 6*d.* per ton, or 996*l.* 15*s.*, subsequently increased to 1000*l.*, in lieu of incurring an estimated expense of 1195*l.* 18*s.* 4*d.*, made up of 664*l.* 10*s.* for hire of barges for storage of about 4430 tons of coal for six weeks; 106*l.* 17*s.* 6*d.*, cost of shifting the cargo; and 424*l.* 10*s.* 10*d.* for reshipping. The total sum when apportioned working out as follows: general average, 219*l.* 11*s.* 3*d.*; cargo, 332*l.* 5*s.*; freight, 644*l.* 2*s.* 1*d.*; and, substituting 1000*l.* as the total sum, the apportionment would be: 183*l.* 11*s.* 10*d.*, to be paid by the owners or underwriters on ship in respect of general average; 538*l.* 11*s.*, to be paid by the underwriters on freight; leaving 277*l.* 16*s.* 4*d.* to be paid by the Admiralty in respect of the cargo.

Cross-actions of damage by collision were commenced by the owners of the two vessels. These actions were consolidated, and, at the trial on July 9, both vessels were found to have been in fault. (1)

At the usual ship's reference, a counter-claim was put in by the owners of the *Uskmoor*, as defendants, and, on December 22, allowed by the registrar, which included 716*l.* in respect of discharging cargo, 590*l.* in respect of expenses before collision, and 1120*l.* in respect of demurrage, or 2426*l.* in respect of these three items, a moiety of which, under the decree of both to blame, was paid by the plaintiffs, the owners of the *Minnetonka*.

On April 29, 1903, the Admiralty issued a writ against the owners of the *Minnetonka* claiming, as owners of the cargo laden on board the *Uskmoor*, damages in respect of the collision, and on April 30 a settlement was arrived at on the terms of the defendants paying 50 per cent. of the plaintiffs' damages, to be assessed by the registrar and merchants.

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(1) See *The Uskmoor*, [1902] P. 250.

The claim filed in the registry by the Admiralty, as owners of cargo ex *Uskmoor*, against the owners of the steamship *Minnetonka*, consisted of two items, namely—(1.) 447*l.* 1*s.* 2*d.*, the difference between the cost (2440*l.* 11*s.* 2*d.*) and the selling price (1993*l.* 10*s.*) of the coal, and (2.) 1000*l.*, being the amount agreed to be paid by the Admiralty to the owners of the *Uskmoor* in view of the voyage being abandoned in London.

On June 12 the registrar reported that the first item of the claim, consisting of the difference between the cost of the coal and the price realized, had been disallowed—with the exception of a moiety of 5*l.* 5*s.* recoverable against the defendants for cost of surveys—on the ground that the cargo owners had not acted with reasonable diligence in not accepting a better price than that ultimately obtained; and with regard to the second head of the claim, which was for 1000*l.* agreed to be paid by the Admiralty to the shipowner for abandoning the voyage, the report proceeded: "It is not clear from the evidence that the whole of this sum was to be paid. In our view of the case, however, this doubt is not material, for we are of opinion that, under all the circumstances, the reasonable and businesslike course for all parties was for the cargo to be sold in the Thames, and the payment of any sum to the shipowner by the cargo owner was not a consequence of the collision for which the wrong-doer is liable. The shipowner has recovered from the wrong-doer the cost of repairs and damages for the detention of his ship; and at the end of the period of detention he was in a position to, and did, take up a fresh charter. The duty of the shipowner being to carry the cargo to its destination, it was to his advantage to make arrangements with the cargo owners whereby he would be free from this duty and be able to take a new cargo when the repairs were finished—any payment, therefore, made by the cargo owners to the shipowners is not a natural and reasonable result of the collision—and, therefore, is not recoverable against the wrong-doer."

The Admiralty accepted the view of the registrar with regard to the claim for the difference between the cost of the coal and the price realized; but, on July 13, moved before Bucknill J., sitting in Admiralty, to vary the report, so far as the second head of the claim was concerned. After argument, the learned judge referred the report back to the registrar to ascertain whether any part of the sum of 276*l.* 18*s.* 4*d.* (277*l.* 16*s.* 4*d.*), a moiety of which was claimed by the cargo owners, had been already allowed to the owners of the *Uskmoor* in their claim against the *Minnetonka.*

On November 20 the registrar further reported that as "on the claim of the *Uskmoor* only the actual expenses incurred for discharging the cargo and for the hire of barges were allowed, no part of the present claim had been dealt with in the ship's reference," though all sums in respect of loss of freight and for expenses at the port of loading were allowed to the shipowners. The report further found (1.) that the voyage was not commercially at an end, and (2.) that on June 18 the repairs were expected to take six weeks; (3.) that 1000*l.* was agreed to be paid on the terms contained in the letter of June 18, explained by the letters of June 19 and 20; (4.) that the solicitor for the owners of the *Uskmoor* stated that the Admiralty, as cargo owners, would be called upon to pay their share; (5.) that it was reasonable and for the benefit of all concerned that the voyage should be abandoned, so that there might be no risk of the deterioration of the cargo; but that "the agreement by the Admiralty to pay 1000*l.*, or a part thereof, was not a reasonable agreement, because the object of the abandonment of the voyage was to save future expenses, and it was unreasonable for the cargo owners to pay any sum to the shipowners, since [? because] it was the duty of the shipowners to take all measures necessary to enable them to carry the cargo to its destination, and, as the voyage was not commercially at an end, the cargo owners could have insisted on their cargo being carried to its destination without any payment to the shipowners except that of the agreed freight. We further find that the agreement, so far as it relates to the payment of 1000*l.*, or any part thereof, was one arising out of the relation between ship and cargo, and that the collision was not the cause of it; and that the sum claimed is inadmissible as a head of damage in an action against the wrong-doing ship." The report further found that "in December, 1902, the owners of the *Uskmoor* recovered from the owners of the *Minnetonka* a complete indemnity for all damages actually incurred arising out of the collision," and that "that indemnity was obtained on the basis of the voyage being abandoned, and included all loss of expenses and all loss of profits from the date of eleven days before the collision when the *Uskmoor* commenced her voyage by bunkering in the Tyne."

On motion in objection to the report, Bucknill J., on February 16, 1904, affirmed the decision of the registrar, and dismissed the appeal of the Admiralty with costs, on the ground that the Admiralty—in respect of the claim of 276*l.*, the proportion alleged to be due from the owners of the *Minnetonka*—had failed to make out a loss directly sustained in consequence of the wrong-doing of those in charge of the *Minnetonka*.

On appeal:—

April 5, 6. *Acland, K.C.*, and *Wills*, for the appellants, the Admiralty, as owners of cargo laden on the *Uskmoor*.

Aspinall, K.C., and *Arthur Pritchard*, for the respondents, the owners of the *Minnetonka*.

The arguments of counsel were the same as in the Court below, except that—as clearly appears from the judgments—the facts were more fully gone into with a view to ascertaining the nature of the findings of the registrar upon which the learned judge in the Court below based his judgment. In addition to the cases of *Svendsen* v. *Wallace* (1), *The Marpessa* (2), and *The Milan* (3), cited in the Court below, the following were also referred to: *The Empress Eugénie* (4), *The Thuringia* (5), and *The Glenfruin*. (6)

(1) (1885) 10 App. Cas. 404.
(2) [1891] P. 403.
(3) (1861) Lush. 388.
(4) (1860) Lush. 138.
(5) (1872) 1 Asp. M. L. C. 283.
(6) (1885) 10 P. D. 103.

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Collins M.R. This is an appeal from the decision of Bucknill J., who had been invited to review the report of the registrar and merchants on a matter which had been referred to them.

The question arose in an Admiralty action between the Admiralty and a vessel called the *Minnetonka*, and the circumstances shortly are these. The Admiralty had chartered a vessel called the *Uskmoor* to carry a cargo of coal from the Tyne to South Africa, and when the *Uskmoor* was proceeding on her voyage down the Channel, near Beachy Head, she came into collision with the *Minnetonka*, with the result that she was seriously damaged and had to put back to London. The repair of the ship there would have involved considerable time and expense; still the ship was quite capable of being repaired, and it was the right of the shipowner, under those circumstances, to insist on carrying the cargo to its destination and earning the freight. One-third of the freight had been paid in advance.

There was at the time an action pending between the owners of the two vessels, and it was not then ascertained how the blame for the collision was to be distributed. Naturally the owners of the *Uskmoor* considered, and no doubt represented to the Admiralty, that their vessel was not to blame, and that the *Minnetonka* alone was to blame. I am now dealing with a time before the rights as between the *Minnetonka* and the *Uskmoor* had been ascertained, and with the fact that the *Uskmoor* had been disabled for the time being, but was capable of being repaired, and was insisting on the right to repair and carry the cargo on to its destination. In those circumstances a compromise was arranged between the Admiralty and the *Uskmoor*. Reasonable steps were taken to ascertain what would be the relative cost of carrying the cargo on to its destination, with the necessary delay for repairs, involving the transhipment and reshipment of the coal and the possible deterioration of the cargo during those processes, and a suggestion was made on the part of the shipowners that they should abandon the attempt to carry the cargo to its destination in consideration of a sum of about 1600*l*. That was an offer to compromise, and terms were discussed. Ultimately a calculation was made as to the length of time during which the repairs would probably last, and as to the cost of warehousing the cargo during that period, and of unshipping and reshipping. A calculation having been made upon that basis, the parties arrived at the conclusion that the reasonable thing, instead of pursuing the voyage and incurring this expense, was that they should agree upon a compromise involving the abandonment of the voyage. Having ascertained, as I say, by calculation, according to the best estimate they could make, what the contribution of the cargo would be, upon an average statement, in the event of the voyage being continued, and having arrived at the conjectural amount of 332*l*., they arranged a compromise, by which they, the Admiralty, agreed to pay to the shipowners 276*l*. By doing that they reduced the sum they would have had to pay on their calculation if the cargo went to its destination, and also avoided, as far as they were concerned, loss on account of deterioration of the cargo. The arrangement was also advantageous to the shipowner, inasmuch as he was at liberty to get a cargo later on as soon as the ship was repaired, and to get another cargo possibly at a better freight. At all events, both sides saw the advantage of settling the thing at once upon the terms I have named, instead of each standing on his rights with the possible consequence of no advantage to either party. If that was a reasonable compromise to make, it seems to me that the amount of that compromise fairly measures the damages to be obtained by the Admiralty against the wrong-doer—that is, the *Minnetonka*.

There is a very important point in this case which did not come out in the Court below, and which was elicited by a question addressed by Mathew L.J. to counsel for the appellants—that is, that, as between the Admiralty and the *Uskmoor*, the owners of the *Uskmoor* are protected by the exemptions in the charterparty from all liability for negligence, and that therefore in arranging the compromise between themselves and the *Uskmoor* the Admiralty had to regard the *Uskmoor* as a person who, as between them and the *Uskmoor*, was free

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from blame, although the *Uskmoor* was afterwards held partly to blame for the collision. That did not affect the rights of the owners of the *Uskmoor* as between themselves and the Admiralty, and therefore the Admiralty were not in a position to say, "You are not entitled to receive anything from us with regard to this collision, which was partly caused by your fault."

Now we have it found as a fact that no part of the 276*l.* has been recovered by the *Uskmoor* against the *Minnetonka*, and the *Minnetonka* has not paid any part of that sum. That fact being found, it gets rid in my judgment of a very formidable argument, if not the main argument, for the respondents in this case. They say it cannot be reasonable to have compromised upon such terms when the person to whom you are going to pay 276*l.*, when he receives it, will receive it in addition to a sum received by him on similar grounds in proceedings between him and the *Minnetonka*. For some time we were under the impression that if the *Minnetonka* were called upon to pay this sum they would be paying again to the Admiralty a sum already paid by virtue of proceedings taken by the *Uskmoor* against the *Minnetonka*. Now, however, we have carefully looked at the findings of the registrar on the matter of fact, and his findings distinctly negative any part of that sum of 276*l.* 18*s.* 4*d.* entering into arrangement between the *Uskmoor* and the *Minnetonka*, or being paid by the *Minnetonka* to the *Uskmoor*. Therefore, the case comes back to this: Does the arrangement made by the Admiralty represent a reasonable compromise between the parties at the time it was made? For reasons I have given I think it was a reasonable compromise; but counsel for the respondents, in their very ingenious argument, took another point. They say, however reasonable the Admiralty may have been when they made the arrangement, they were bound to readjust it in view of possible litigation between the *Uskmoor* and the *Minnetonka*, the fact not having been ascertained whether both were to blame or which. They say that some provision should have been inserted in the agreement to allow of its being readjusted in accordance with the result of that litigation; but when one comes to look at the point in respect of which that contention is made it seems to me it does not arise, because when we have once disposed of the fact that this sum did not come and ought not to come into discussion between the *Minnetonka* and the *Uskmoor* it entirely disposes of the suggestion that it was unreasonable to make a settlement without regard to subsequent litigation. It could not be an element, and was not an element, in the adjustment of the rights between the *Uskmoor* and the *Minnetonka.* That being so, it seems to me perfectly clear—having disengaged this matter, which was very complex in the statement, from all the confusion which surrounded it, and ascertained the real facts upon which the registrar's report was given, and the learned judge's judgment proceeded—that the plaintiffs are entitled to recover against the *Minnetonka* the sum claimed. With respect to the learned judge's judgment, it seems to me he really had not before him the facts as ascertained and explained to us. His judgment seems to have proceeded upon grounds quite outside the grounds which have been pressed upon us in the discussion in this Court. As far as I can understand the grounds of his judgment, they seem to have been rather based upon the expression of law which he extracted from the case of *The Marpessa.* (1) I cannot pretend to say that I very clearly follow the train of reasoning based upon that case, but it seems to suggest that the wrong-doer, who is liable for some sum in respect of damage caused to the plaintiff, is relieved from all liability in respect of it if that sum of money has been arrived at by some compromise between the parties, whether reasonable or not, on the ground that the sum payable in respect of which the claim is made against the wrong-doer is a sum which became payable under the compromise, and therefore is not the direct consequence of the collision.

It seems to me that the only consideration is whether the compromise was reasonable—whether it was a reasonable way of adjusting the sum for which the wrong-doer was liable—and that the simple process of assessment does not break the chain of causality. The points which have been carefully

(1) [1891] P. 403.

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discussed before us—first, what were the real facts found by the registrar, and, secondly, was the compromise reasonable—do not seem to have been argued before the learned judge. They have been argued before us, and I do not think we are really differing from his view in holding that this sum is recoverable from the *Minnetonka*. The appeal must succeed.

Mathew L.J. I am of the same opinion. The owners of the *Uskmoor* were, as between themselves and the Admiralty, not to blame, and, therefore, were entitled to have the average contribution ascertained in the usual way, and it seems to me to be perfectly clear that the arrangement come to between the Admiralty and the owners of the *Uskmoor* was reasonable, not only as regards those interests, but also as regards the interests of the owners of the *Minnetonka*. The *Minnetonka*, fortunately for herself, is only condemned in one-half of the necessary expenditure. Now, the necessary expenditure here, if the arrangement was reasonable as between the cargo owners and the *Uskmoor*, was 276*l*. It was arrived at upon the footing that you would have to pay averages of far larger amount if the voyage was proceeded with. It was a perfectly reasonable and businesslike arrangement, and one of which it appears to me the *Minnetonka* has no right to complain. It is said, however, that it would be a great injustice to put this charge, reasonable though it be, upon the owners of the *Minnetonka*, because there has been a reference, and the result was to include this very sum in the damages, which must be paid by the *Minnetonka* to the *Uskmoor*. After discussion and examination, it is now made clear that the documents have been misinterpreted in that respect, and the sole question, therefore, is whether it was a reasonable arrangement. It seems to me that it was reasonable.

Cozens-Hardy L.J. I agree.

Appeal allowed.

Solicitor for appellants: *The Treasury Solicitor.*
Solicitors for respondents: *Pritchard & Sons.*

T. L. M.

HUNTER *v.* HUNTER (THE KING'S PROCTOR SHEWING CAUSE).

1905
May 31;
June 1, 5.

Divorce—Decree Nisi—Intervention of King's Proctor—"Material Facts" withheld.

The mere concealment of material facts is not the same as collusion which results in the concealment of material facts.

If, upon investigation of all the facts, the Court should be of opinion that, in the exercise of its discretion, a decree dissolving the marriage would have been pronounced, had all the facts been before it at the hearing of the petition, the mere fact of non-disclosure at that hearing is no ground for rescinding the decree then pronounced.

Alexandre v. *Alexandre*, (1870) L. R. 2 P. & M. 164, approved.

Butler v. *Butler*, (1890) 15 P. D. 66, discussed.

Roche v. *Roche*, [1905] P. 142, questioned and not followed.

INTERVENTION by the King's Proctor.

The petitioner (wife) obtained a decree nisi on April 25, 1904, on the grounds of adultery and desertion.

In January, 1888, the respondent, who had gone to America, ceased to correspond with his wife or to supply her with means of support. The petitioner believed her husband to have died.

The facts, so far as they appear to be material, are summarized in the judgment.

Willock, for the petitioner. *Alexandre* v. *Alexandre* (1) is still an authority. *Roche* v. *Roche* (2) was wrongly decided.

Priestley, K.C., and *W. O. Willis*, for the King's Proctor. The petitioner is not entitled to relief: *Harraden* v. *Harraden and Boham* (3); *Wyke* v. *Wyke* (4); *Roche* v. *Roche*. (2)

Cur. adv. vult.

June 5. SIR GORELL BARNES, PRESIDENT. This was an intervention by the King's Proctor on the ground that the petitioner had been guilty of adultery with a man named Charles Turner, and that that, being a material fact, had been withheld by the petitioner from the knowledge of the Court at the time of the hearing.

(1) L. R. 2 P. & M. 164.
(2) [1905] P. 142.
(3) *The Times*, June 3, 1904.
(4) [1904] P. 149.

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The petition was presented on June 27, 1903, and the decree nisi was made on April 25, 1904. The intervention was on the ground which I have already stated, and that adultery was proved and was not disputed. The answer to the King's Proctor's plea was that "the petitioner admits that she committed adultery as set forth in the said plea, but alleges that at the time of the said adultery she believed the said William Henry Joseph Hunter," her husband, "was dead." The adultery that was referred to in the pleading by the King's Proctor was not disclosed at the hearing, the petitioner stating in Court that she had been ashamed of the matter, and she had neither told the Court about it nor had she told her solicitor; and the King's Proctor therefore asked that the decree nisi should be rescinded.

The King's Proctor puts his case on two grounds: first, that the mere fact of the concealment of the adultery which is alleged against the petitioner, and which she admits, is sufficient to set aside the decree; and, secondly, that if that is not, strictly speaking, so, on the facts which were disclosed, there was no case made out by the petitioner for the exercise by the Court of its discretion in her favour.

The answer that is made on the part of the petitioner to those two points is as follows: first, that the mere fact of the concealment having taken place in this case is not sufficient, having regard to the nature of the case, to justify the Court in setting aside the decree; and, secondly, that the case is one in which the Court should exercise its discretion in favour of the petitioner, taking all the facts as they are now known to the Court.

A short summary of those facts is as follows. On July 19, 1884, the petitioner and respondent married. In 1885 a child was born, and shortly afterwards they went to America. In 1887 the husband sent the wife home for the purpose of a second confinement, which it was desired should take place in this country, and in December, 1887, the second child was born; that child died on May 25, 1888. She wrote to her husband from time to time after arriving in this country, and no answer was received from the husband after a certain period. It was said at the hearing before me when the case came on as an undefended case that the last letter from the husband was in July, 1888. At the hearing of this intervention it was said by the petitioner that the month of July was an error, and that the true time at which the last letter was received from her husband was in January, 1888. There is not the slightest doubt that in the shorthand note the date given at the hearing before me was July, 1888. The note was produced, and the evidence of the shorthand writer was conclusive as to that. The question has, however, been very fully discussed before me with regard to the evidence of the petitioner herself and one or two other witnesses, and in particular a tailor's book was produced in which there was, early in February, an entry of two black dresses made for the petitioner and her mother-in-law, and she said that the mother of the respondent had provided those dresses. Whether those were for mourning or not may be a question, but there is no doubt about the entry in the tailor's book applicable to that particular date; and, after considering the matter with some care, I think I am justified in holding that the last date on which the husband had communicated with his wife was January, 1888. It was said by the petitioner that at some period word had been sent by Mrs. Thompson, a sister of the respondent, who was then in America, to the respondent's mother in England, that the respondent was dead, and that was then communicated to the petitioner and believed by her, and in consequence of that these mourning dresses were ordered, and paid for by the respondent's mother. The evidence before the Court on the hearing of the undefended divorce cause was that nothing was said about this particular date, so far as the death of the husband was communicated from America. What was then said was that in 1890 the wife was told by a man who called where she and her own mother were living that he had been requested to convey to the petitioner that her husband had died of yellow fever in America. She is said to have exclaimed "No, no!" When asked if she had heard about it, she stated, "I said that to get more out of him." There is, therefore, a dispute on the evidence which is now before the Court as to whether she was told of her husband's death in January, 1888, or in the early part of 1890.

I have seen the petitioner and her mother and a Mrs. Betts, and I have had this tailor's account before me, and I think that on the whole the real information about this was conveyed as early as January, 1888; and I think, therefore, it is true to say that she believed from the early part of 1888 that her husband was dead. It did not turn out to be the fact. What transpired afterwards will appear a little later on; but on May 25 the child, who, as I have mentioned, was born in 1887, died, and on May 26 the petitioner, who had previously made arrangements for that purpose, became a stewardess on board a steamer. The adultery proved by the King's Proctor and admitted in fact is that in 1889 she was seduced by the captain of that ship. Whether that is the correct term or not is a question, but, at any rate, that is the way she puts it, and she said that that is the sort of risk that a person in her position is exposed to. Whatever the truth about that may be, at any rate there is no doubt that intercourse took place between her and this captain, and that continued more or less until the year 1891. She suggests that at the time that that first began she thought he was a widower, but learned afterwards that he was not, and that he had made her a promise of marriage, and repeatedly was asked to fulfil that promise. His wife, it was said, was an invalid, and after her death he was asked to perform this promise; but he did not carry it out, because he died in 1891. There was a child born of this man's intercourse with this woman in 1890, and she registered that child as having as its parent her own husband. She said she did that because she was ashamed of the matter and did not want to leave a stigma on the child later on in life. I think that something of that sort must be correct, because the registration appears to be at a time when she had had the interview with the man in April, 1890.

On July 14, 1891, after the death of Turner, she married a man named Overstall, who had been a friend and who seems to have known her history. Overstall was killed on the railway in the next year. After his death on December 22, 1892, she married a man named Ashton, and it is said that Ashton also knew what had taken place with Turner and the fact that there had been a child born by him. In July, 1902, Mrs. Thompson, who had, it is said, sent the original information with the object of assisting her brother to deceive the petitioner, came over to this country, and then informed the petitioner that her husband was alive at this time and laughed at the deceit which had been practised. Apparently the reason for practising such deceit was that the husband had taken to live with another woman by whom he had two or three children, and was still, and for all I know is now, living with this other woman and the children in America. On receiving this information the petitioner separated at once from Ashton and brought her suit before the Court. She told the Court all about the marriages—I think I am correct in this—with Overstall and Ashton, but nothing about the relationship which she had had with Mr. Turner was mentioned.

The first question for my decision is whether the petitioner is to be trusted when she says that she had gone through the experience which she did go through after 1888 in the belief that her husband was dead. After reviewing the facts, and having seen the woman, who, although she seems to have had to a certain extent an adventurous career, appeared to be a very respectable person and a person of decent behaviour, which is illustrated to some extent by the fact that she separated from Ashton as soon as she found out what the state of things was, and then brought her suit with the object of placing herself in a proper position—I think the fact is that she really believed her husband was dead from the early part of January, 1888, and that she had been imposed upon with these unfortunate consequences. That being the state of things, it is a class of case in which, if the matter were disclosed in the first instance, the Court would be at liberty to exercise its discretion in her favour and grant her a decree of divorce against the man who deserted her in the way described, and who has been living in adultery for a number of years with some other woman in America. But then come the points which are raised in the intervention of the King's Proctor. As to the first point, there is no dispute that she did not inform the Court of the relations that existed between herself and Turner. She had not, I think, told her solicitor anything about it, and had kept it entirely to herself. She said she had not mentioned this because she was ashamed of the whole thing, and therefore had neither told her solicitor nor had told the Court, and I do not think that I should be justified in holding that the woman had acted in a fraudulent way with a deliberate intention to gain an advantage by deceiving the Court, though of course it is obvious that that is the result of what she did in keeping back the facts. I think that she is one of those people who are of a rather low class in life, and being ashamed of what she has done thinks that the less said about it the better. But that there was a deliberate intention to come here and deceive I do not think sufficiently made out against her. Therefore, the question becomes a purely legal question: first, whether the mere fact of this matter having been kept back is sufficient by itself to require the Court to rescind the decree nisi. I do not think that I should have felt any substantial difficulty about the case were it not for the decision which has been called to my attention of *Roche* v. *Roche* (1), which was before my brother Bargrave Deane J. in the early part of this year. The head-note to the case is this: "If a petitioner withholds from the Court on the hearing of a petition for dissolution of marriage the fact that she has committed adultery, such withholding of a fact is of itself a ground for refusing to make the decree absolute, even though the adultery is found, on a full investigation of all the facts of the case, to be such as would warrant the Court in granting the petitioner relief, and though, had the facts been fully disclosed to the Court in the first instance, it would, in the exercise of its discretion, have granted relief." That is a case which presents some little difficulty in deciding the present case. I have read the arguments and the judgment, and I am very much struck with the fact that the leading case on that subject is not referred to in the arguments nor in the judgment, and therefore it does not appear, as far as I can judge from the report of the case, to have ever been called to the attention of the learned judge. I refer to *Alexandre* v. *Alexandre (the Queen's Proctor intervening)* (2), which is of a very much stronger character against the petitioner than the present case. It

(1) [1905] P. 142.

(2) L. R. 2 P. & M. 164.

appears that there were two charges of adultery in the petition, and the petitioner alleged that neither of these charges had been condoned. The Queen's Proctor intervened, and proved condonation of one of the charges of adultery but not of the other, and the Court made the decree absolute on the ground of the uncondoned adultery, notwithstanding the suppression of the material fact of the condonation of the other adultery. The reason why that case is so strong is that, on an examination of the facts, it will be seen that there was deliberate deception of the Court, and yet, notwithstanding this deliberate deception, the decree was made absolute.

It is important to consider that case, because it has been referred to in a more recent case, in which, to my mind, it has been misunderstood. I do not mean the case of *Roche* v. *Roche* (1) but another case, to which I shall have shortly to refer. What the Queen's Proctor alleged in *Alexandre* v. *Alexandre* (2) was that material facts as to the conduct of the parties had been withheld from the Court; that the petitioner connived at and was accessory to the respondent's adultery; and that the petitioner lived separate and apart from the respondent the greater part of the time between the marriage and the filing of the petition without contributing to her support, and by his wilful neglect and misconduct conduced to her adultery. That case did not turn on collusion at all. [The learned President read the statement of proved facts and the argument from pp. 165 and 166 of the report.]

That was an extremely strong case, because there was a deliberate falsehood told in the affidavit verifying the petition. The Judge Ordinary (Lord Penzance) said (3): "I quite agree that the petitioner did fail to bring before the Court some most material facts. In his petition he charged his wife with adultery on two separate occasions. The first adultery was that which resulted in the birth of a child. Being aware that after the birth of that child he had taken her to live with him again, in his petition he endeavoured to explain his conduct by alleging that, at the time he resumed cohabitation with

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(1) [1905] P. 142.

(2) L. R. 2 P. & M. 164.

(3) L. R. 2 P. & M. at p. 166.

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her, he did not know of the birth of that child. In that way he endeavoured to get rid of the condonation which, according to the facts as they now stand, undoubtedly existed in respect of that adultery. So far, I think, the learned Attorney-General's argument is well founded, because it turns out now, assuming what this woman says to be true, that he perfectly well knew, at the time he took her back, that she had had a child. But there is nothing, as it seems to me, in the 7th section of the statute that would justify the Court, on the mere proof that some material facts had been kept back, in refusing the petitioner his divorce, if it appears, upon all the facts being known, that he is in all other respects entitled to it." Then he proceeded to consider the facts as if they had been brought before the Court in the first instance, and he goes on, towards the end of his judgment, to say (1): "It seems to me, therefore, that as there was no condonation of the adultery there committed, I ought not to withhold the decree. At the same time, it was a most proper case for the Queen's Proctor to investigate. The Court would not have known the real facts of the case if the Queen's Proctor had not intervened; and the petitioner has only himself to thank for the intervention, because he deliberately inserted in the petition this false statement about the child."

That was a much stronger case than it is generally thought to be when it is closely examined. The next case that it is desirable to refer to is the case of *Butler* v. *Butler* (2), which has to some extent been thought, though I think entirely erroneously, to throw some doubt on *Alexandre* v. *Alexandre*. (3) In *Butler* v. *Butler* (2) it was held, first, that under the Matrimonial Causes Act, 1857, a wife was deprived of her right to a decree, not only if she had been guilty of a matrimonial offence, but also if her petition had been presented or prosecuted in collusion with the respondent; and, secondly, that an agreement between the parties to a divorce suit to withhold from the Court pertinent and material facts, which might have been adduced at the trial in support of a counter-charge, amounted to collusion, even though the facts suppressed might not have been sufficient to establish such counter-charge. The only observations about *Alexandre* v. *Alexandre* (1) in that case are to be found in the judgment of Cotton L.J., when he says (2): "Here the husband agreed with the wife that he would not support his charge against her, that he would not cross-examine her, and that he would withdraw his counter-charge. In my opinion that was a suppression of material facts and collusion. It is said that *Alexandre* v. *Alexandre* (1) is inconsistent with that. We are not, however, bound by that decision, and if it does really lay down any such rule as is contended, I must, with every respect for the judge who decided that case, express my opinion that it is wrong; because I think there is collusion, independently of the question whether it is proved ultimately that the petitioner has committed a matrimonial offence, where the parties agree together not to bring before the Court facts which are relevant to the case, and which will enable the Court to decide one way or the other if brought before it. And here one can see that these facts were never properly submitted to the first jury, or put before them in such a way as they ought to have been by the husband when prosecuting his charge." Lindley L.J. does not refer to that case, but Lopes L.J. does, and he says (3): "I agree with what was said by my learned brother with regard to *Alexandre* v. *Alexandre*. (1) If it is intended to mean that which is suggested, I doubt very much if it is correct." That case had only to do with collusion. Collusion is an absolute bar to a suit, and it does not matter, as was pointed out in that case, whether the facts which by collusion are suppressed are such as would have made a difference in the decision or not. If they were, by agreement between the parties, suppressed, that is collusion and there is an end of the case.

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(1) L. R. 2 P. & M. at p. 168.

(2) 15 P. D. 66.

(3) L. R. 2 P. & M. 164.

It is quite different from concealment of material facts, though of course collusion would be a material fact which, if kept back, might throw doubt upon what might be the facts of the case. That that is so is I think clear upon the law applicable to this case. The rights to deprive a petitioner of a divorce are those conferred by the Act under which the Divorce Court was constituted. There are certain bars which are absolute; certain bars are in the discretion of the Court; and, if any of those defences are made out, then the suit fails.

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(1) L. R. 2 P. & M. 164.

(2) 15 P. D. at p. 72.

(3) 15 P. D. at p. 74.

The object of the statute which allows an intervention, 23 & 24 Vict. c. 144, is to prevent a decree being obtained when, if the true facts were known, it ought not to be granted; this is clear from the wording of the section. The words are: "and during that period"—that is, the period during which the decree is a decree nisi—"any person shall be at liberty in such manner as the Court shall by general or special order in that behalf from time to time direct, to shew cause why the said decree should not be made absolute by reason of the same having been obtained by collusion or by reason of material facts not brought before the Court." Any person may intervene on these grounds. Then it goes on: "and on cause being so shewn the Court shall deal with the case by making the decree absolute, or by reversing the decree nisi, or by requiring further inquiry, or otherwise as justice may require." What is it justice requires? Justice requires that the decree should be not allowed on the ground on which the earlier Act says it should not be allowed. But if it is clear that none of the matters have been established which prevent the decree being made, then it seems to me that the justice of the case requires that the decree should be allowed to go through. It is not a question of discretion, but a question of what is the justice of the case, and that is only to be ascertained by finding out what is the law applicable to the case. Then it goes on to say: "and at any time during the progress of the case or before the decree is made absolute any person may give information to Her Majesty's Proctor of any matter material to the due decision of the case, who may thereupon take such steps as the Attorney-General may deem necessary or expedient. And if from any such information or otherwise the said Proctor shall suspect that any parties to the suit are or have been acting in collusion for the purpose of obtaining a divorce contrary to the justice of the case, he may intervene," and so on. The latter part refers to a case where the King's Proctor alone could come in on the ground of collusion, and the earlier part applies to cases where anybody may come in, and in the case where the King's Proctor comes in under the earlier part of the section he comes in as one of the public.

I do not think myself that the 7th section gives any new ground for defeating a decree. It must be defeated, it appears to me, upon the ground upon which it ought to have been defeated if all the facts were before the Court in the first instance.

There are one or two general observations about this point which I propose to make directly, but that that view has been acted upon, as I think, since the case of *Alexandre* v. *Alexandre* (1) is shewn by a good many cases. I may give two instances. One is the case of *Symons* v. *Symons* (*the Queen's Proctor intervening*) (2), where "A husband who treated his wife with great cruelty during cohabitation, finally deserted her and went to live with another woman. More than seven years after the desertion the wife, not knowing whether her husband was alive, and without making inquiry, commenced to live with another man; the cohabitation continued long after the time when it came to the wife's knowledge that her husband was alive. Subsequently, and after the wife had ceased to live in adultery, her husband was convicted under the Criminal Law Amendment Act, 1885, of an aggravated offence on a young girl not amounting to rape." It was held that under the circumstances the wife's adultery did not disentitle her to a decree of dissolution of marriage, although the facts about her adultery had not been placed before the Court.

There was a case before myself in which the matter was also considered: *Burdon* v. *Burdon*. (3) That was a case where the wife had kept back the fact that she had resorted to living with some one after she had been driven to prostitution by her husband, and the facts as to what had taken place afterwards were not brought before the Court. The head-note upon that is: "Three years' cohabitation and some other facts very

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(1) L. R. 2 P. & M. 164.
(2) [1897] P. 167.
(3) [1901] P. 52.

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material to be considered by the Court and such as ought not to have been withheld at the hearing of the petition being insufficient to bar the wife's claim to have her marriage dissolved on the grounds of her husband's adultery and cruelty, though amply sufficient to warrant and justify the intervention of the Queen's Proctor."

The case of *Harraden* v. *Harraden and Boham* (1) has practically no bearing upon this present point, because, although the decree nisi was rescinded, there were not placed before the Court then and there the materials upon which, if the Court could have exercised its discretion, it would have acted, and what was done there was that the decree nisi was rescinded, and leave to proceed with the petition was allowed, and, if the petitioner could have laid before the Court facts which would have justified a decree, I suppose he would have got his decree, notwithstanding the intervention, and then the intervention would have been perfectly useless, except as checking the statements and position of affairs at the moment.

That brings me, then, to the very recent case of *Roche* v. *Roche*. (2) I think that in consequence of the case of *Alexandre* v. *Alexandre* (3) not being fully considered in that case, the learned judge has treated the words "concealment of material facts" exactly on the same basis as if they were collusion. The difference is that in collusion there is an absolute bar to the right to a decree under the 30th section of the original Act of 1857, but facts which are kept back are only material if, when disclosed, the Court would say that, knowing these facts, the Court would not allow the decree. That is the difference, and it is one of an essential character; and it appears to me that it is necessary, at the close of an inquiry of this kind, to determine whether the facts, when the whole of them are before the Court, are such as to disentitle a petitioner to a decree. I think that, if one were to treat it from a different point of view, one would reach this singular result: that if the decree were rescinded, merely because something were kept back, one would have to test what is enough to be kept back to disentitle a person to a decree, and it would be exceedingly difficult to determine what is enough, because, if one fact is kept back, and yet the Court would have pronounced a decree, there is no possibility of drawing any line. It seems to me the only satisfactory line that can be drawn is to be drawn by determining whether, on knowing all the facts, the Court would have pronounced a decree, and that, in my view, is the object of the Act. Facts though improperly suppressed which if known would not have prevented a decree being made, and make no difference to the ultimate decision, become strictly speaking immaterial, though of course it is obvious that concealment of facts would make it extremely difficult for a person concealing them to convince a Court afterwards that if they had been known they would not have affected his right to a decree.

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(1) *The Times*, June 3, 1904.

(2) [1905] P. 142.

(3) L. R. 2 P. & M. 164.

It is not necessary in this case to go so far as to say that in no case of fraud would the Court stop a decree on the ground merely that it was deceived, because it may be argued in some cases that there has been a concealment, and a deliberate concealment, and therefore the decree should be rescinded, leaving the petitioner to take any steps that he or she may think fit.

My own opinion, however, is that the decree ought still to go through, if upon the whole facts being known the case is one in which, had those facts been known in the first instance, a decree ought to be granted. It is, of course, correct to say that no Court is bound to abide by a decree obtained by fraud, if that fraud has produced results which the Court ought not to allow. That depends upon the general grounds upon which a Court sets aside a decree on the ground of fraud, and results in an inquiry which appears to me somewhat different from that under the Act which I am considering, by which certain rights of intervention are given to the public and to the King's Proctor.

Decrees obtained by fraud, generally speaking, can only be set aside by the person injured by them; and then at once one is driven to this consideration, that a person is not injured, and a decree would therefore not be set aside, if the Court, taking all the facts into consideration, is satisfied that it was right that the decree should be made. In other words, the fraud produces no improper results; and that, I think, must still be

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so, and no person can effectively intervene, if he can intervene at all on general grounds, unless the case is one in which there is an injury produced.

So that the result seems to me to be this—that in this case it is not necessary to determine what is the position in the case of a deliberate fraud, though if I had to do that I should certainly follow the case of *Alexandre* v. *Alexandre* (1), which seems to me to be right in principle. Any other position would lead to difficulty, because it could not be contended that, if this decree nisi were set aside merely on that ground, the petitioner is not entitled to go on again, and the result would simply be that she would go on again at considerable expense and get her decree in the end, and nothing would have taken place in the meantime except by making her for a time wait until she could prove her case again. And my conclusion is that if, all the facts being known, the Court thinks this case is one in which it ought to grant a decree, the proper course to take is to let the decree nisi stand and to allow it to be made absolute. I have dealt with this case at some length because of this recent case of *Roche* v. *Roche* (2); but I think I am able to say that the present case is one in which, all the facts being known, the petitioner is entitled to a decree in the exercise of the Court's discretion. To a person in such a position it would be an enormous hardship to allow the decree to be rescinded, and to force her to go over every detail of the matter again, and produce exactly the same result if the Court still thought at that time that she was entitled to a decree upon the whole facts. To my mind, therefore, this intervention does not succeed; but it is perfectly obvious that the case is one in which the King's Proctor was not only fully justified, but perfectly right, in investigating all the facts.

[After some discussion, costs were given to the King's Proctor.]

Solicitors: *The King's Proctor; C. J. Smith & Hudson, for G. S. Williamson, Hull.*

(1) L. R. 2 P. & M. 164.

(2) [1905] P. 142.

H. D. G.

W. *v.* S. (OTHERWISE W.)

1905
June 21.

Nullity of Marriage—Husband's Petition—Non-consummation—No Cohabitation — Respondent's Refusal to submit to Inspection — Evidence of Incapacity.

Where there had been entire absence of cohabitation, incapacity to consummate on the part of the wife was found as a fact, on positive evidence arising from a statement made by herself, taken in conjunction with the general facts of the case and her refusal to submit to medical inspection.

THIS was a suit by a male petitioner for a decree of nullity of marriage on the ground of the incapacity of the respondent to consummate the marriage.

The petitioner alleged that the ceremony of marriage was solemnized on April 4, 1900; that the parties had "never lived and slept together"; and that the respondent was "at the time of the marriage and still incapable of consummating the said marriage."

The medical inspectors appointed by the Court found that the petitioner was capable of the act of generation; but the respondent did not attend in obedience to the order for examination.

The facts, shortly stated, were that the respondent willingly accepted the petitioner's offer of marriage, but after the ceremony she refused to cohabit with him and had never done so.

The petitioner on several occasions made efforts, short of actual violence, to consummate the marriage, but he was on every occasion repelled by the respondent, who was said to have offered him no explanation of her conduct.

The respondent, in writing to the petitioner, used the expression, "I am no good," and she repeated this expression verbally to him.

The last occasion when the petitioner interviewed the respondent on the subject of their marital relations was in August, 1900.

The respondent entered an appearance to the citation but filed no answer, and her solicitor stated to the registrar that she refused to attend the medical inspection.

Le Bas, for the petitioner. The admission of the respondent that she was "no good," coupled with her refusal to attend the inspection and the general facts of the case, should lead the Court to hold that there is substantive evidence of incapacity, and that this is not a case of mere wilful refusal on the part of the respondent. The petitioner is entitled to his decree. It is not his fault that there has been no cohabitation. [He referred to *A.* v. *A.* (1); *F.* v. *P.* (*falsely called F.*) (2); *B.* v. *B.* (3); *Pollard* (*falsely called Wybourn*) v. *Wybourn.* (4)]

SIR GORELL BARNES, PRESIDENT. *B.* v. *B.* (3) was a case of a male respondent. Although mere wilful refusal to consummate the marriage is insufficient to warrant a decree of nullity, there are, no doubt, cases where incapacity to consummate may be inferred from the fact of refusal. The reported authorities on this question of inference are not very satisfactory to my mind. Most of them have been ex parte, and it may be that cases will arise in which it will be deemed expedient by the Court that the facts should be remitted to the King's Proctor for further and fuller investigation and argument. In the present case, however, I do not think that the petitioner need be put to that extra expense. There is, in the statement of the respondent as given in evidence, corroborated, as it seems to be, by the other circumstances in the case, positive evidence of incapacity upon which the Court can act. I find, therefore, that quâ the petitioner, the respondent was incapable. I desire expressly to refrain from treating this as a case of inference.

I pronounce a decree nisi.

Solicitors for petitioner: *Fielder, Fielder & Jones, for Wise & Wise, Manchester.*

(1) [1901] P. 284.
(2) (1896) 75 L. T. 192.
(3) [1901] P. 39.
(4) (1828) 1 Hagg. Ecc. 725.

H. D. G.

HODGSON *v.* HODGSON AND TURNER.

1905
May 24, 25;
June 5.

Divorce—Desertion by Petitioner conducing to Adultery of Respondent—Discretional Bar—Amended Prayer for Judicial Separation—Petition dismissed.

In considering to what extent desertion, not a matrimonial offence in the Ecclesiastical Courts, is to be held now to be a bar to relief, the Court will especially have regard to the question whether it has conduced to the misconduct of the other spouse, the principles on which the Ecclesiastical Courts acted having been apparently to refuse relief to a petitioner found guilty of conduct conducing to the misconduct of the respondent.

Where the Court found that desertion by the petitioner had conduced to the adultery of the respondent:—

Held, that the petitioner was not entitled to a decree of judicial separation.

THIS was a petition by the husband for dissolution of marriage on the ground of the respondent's adultery in and after 1900.

The answer traversed the allegations of adultery, and countercharged against the petitioner cruelty, desertion, and conduct conducing to the adultery.

The only reportable point was as to desertion, and the facts in relation thereto were that in July, 1890, the respondent (wife) obtained an order, under the Married Women (Maintenance in Case of Desertion) Act, 1886 (49 & 50 Vict. c. 52), for payment by the petitioner of 7*s.* per week.

There was one child issue of the marriage.

The petitioner paid the allowance for a few months only, and then, in October, 1890, went to America and sent no more money to his wife, who never heard from him until she received from him a letter, the date of which was not proved, in which he alluded to their unhappy union, and said he would "submit to a divorce" if his wife desired one. The respondent was then living in adultery with the co-respondent, she not knowing whether her husband were alive or dead.

The petitioner, in the witness-box, admitted that when he

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went to America he intended to pay his wife no more money. The arrears under the order amounted, at the date of the hearing of this petition, to about 255*l*. He admitted that he heard of the birth of the child of the marriage.

On the facts stated being established, Sir Gorell Barnes, President, found that the adultery of the respondent with the co-respondent was proved, but held that the petitioner's claim to have the marriage dissolved was barred by reason of his desertion, and that such desertion had conduced to the respondent's adultery.

Gwynne Hall (*Priestley, K.C.*, with him), for the petitioner, asked leave to amend the prayer of the petition by claiming a decree of judicial separation. By s. 22 of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), a claim for a judicial separation is to be dealt with on principles which, in the opinion of the Court, shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts acted. In those Courts, a husband suing for a divorce a mensâ et thoro on the ground of his wife's adultery was not barred by his own misconduct. There is no precise authority to be found in the decisions of those Courts as to the effect of desertion, because desertion was not a matrimonial offence until the passing of the Act of 1857. [He referred to *Reeves* v. *Reeves* (1), *Sullivan* v. *Sullivan* (2), and *Morgan* v. *Morgan*. (3)]

Waddy, for the respondent. Misconduct bars the right to a judicial separation: *Otway* v. *Otway*. (4) At all events, desertion on the part of the husband is a matter for consideration in the exercise of the discretion of the Court as to whether he is to be allowed the relief which he claims: *Duplany* v. *Duplany*. (5) Here the desertion directly conduced to the adultery. The Ecclesiastical Courts appear not to have refused relief to parties guilty of what were matrimonial offences in their day, but it does not follow that they would not have done so in such a case as this if desertion had been then, as it is now, a matrimonial offence. [He also referred to *Synge* v. *Synge*. (1)]

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(1) (1813) 2 Phil. 125.

(2) (1824) 2 Add. 299.

(3) (1840) 2 Curt. 679.

(4) (1888) 13 P. D. 141.

(5) [1892] P. 53, at p. 57.

H. W. Wilberforce, for the co-respondent.

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Cur. adv. vult.

June 5. SIR GORELL BARNES, PRESIDENT. In this case a petition was filed on the ground of the adultery of the respondent with a man named Turner. The adultery was proved to have taken place in 1900 and 1901, or about those years. The wife set up a defence of cruelty, which the husband denied, and he said that she was a drunken and violent woman. But it appears that, whatever the true state of things was between them, the wife succeeded in obtaining an order which, although not effective, shews what the position of things was on July 10, 1890. A summons was taken out by the wife, charging the husband with violently and unlawfully assaulting and beating her; and the Court, being of opinion that the charge was proved, held that the offence was of so trivial a nature that it was not expedient to inflict any punishment and dismissed the information, but ordered the defendant to pay the sum of 4*s*. That was on July 10. On July 11 she took out a summons against him for desertion, because he never returned after that order; and on July 21 the summons for desertion came on before the magistrate, and the magistrate found "that the defendant has deserted the complainant, and orders the defendant to pay to the complainant under the provisions of the Act the sum of 7*s*. per week" until the order was ended in due course of law; and he was to pay 12*s*. costs. There was a contest before me, on the hearing of the petition, as to whether that order was really a true representation of what had occurred between the parties, but I came to the conclusion that it was. The husband paid under this order until the month of October, and he took no steps to set it aside. I thought that he had been guilty of desertion, and he shewed his view of the effect of the order by paying under it till October, 1890. Then there is not the slightest doubt as to what

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(1) [1900] P. 180.

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happened. In order to avoid the operation of that order he went off to America in the year 1890, and from that time for years afterwards the wife never heard a word from him. He sent her no money. He knew that she was pregnant when he sailed, but he sent nothing either for her or for the child, and he left her without any support or assistance whatever. The first she really heard of him was in an undated letter in or about 1899. He says in that letter: "No doubt this letter will be a great surprise to you but I heard some time ago from England that you were keeping company with a young man in the employ of some railway company in Sheffield and that you were very desirous of being married providing that you were free from me. Now Jessie you and I have been married eleven years and we have lived apart almost ten years. I am very sorry to have to say it but it must be that we were not mated properly and were we a little older at the time we might have considered marriage a little more serious, but of course like many others I suppose we were too young to realize what we were doing at the time but the result has been to make us both miserable since the first year of our marriage and with no future prospects to either of us but now that I hear of your prospects to be married again I will submit to a divorce if you desire one. I do not wish to stand in your way so if you wish you can send all particulars to my mother at 11, Harewood Road, Bradford, and I will send you the papers to sign a dissolution of marriage hoping you are well from yours, A. Hodgson." What he expected to get by that letter I am sure I do not know, because signing papers alone will not effect a divorce either in this country or in America. Nothing was done by the wife upon that. She had taken to living with a man named Turner, and I think she had done so, first having gone to nurse his wife, and then, as very naturally perhaps should have followed in such circumstances, and among people of this class of life, she took up with this man Turner. She does not appear to have known whether her husband was dead or alive, and so matters stood until he came over to this country. He had been in America all this time. He had prospered and made a certain amount of money, and certainly

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he had plenty of money during the time he was in America to have sent his wife and child something; but he never took any steps to assist them in any shape or form up to the time when he returned to this country. As I understand, at that time a warrant was out against him for the payment of these arrears, which I am told now amount, at the rate of 7*s.* a week, to something like 255*l.* In the witness-box here, he used language to the effect that he would support his wife if made to. This is what he said in cross-examination: "I intended to pay no more when I left. I went to avoid paying any money. I did not send my address or communicate in any way. I sent no money. I heard about the child being born," and so on; and then further on he said: "The arrears are 255*l.* I will support the child if made to." That is the position of things, and in 1904 he brought against his wife this suit, in which he prays for a divorce. I held that he had been guilty of desertion without cause for a very long period of time, and that he had also been guilty of conduct conducing to the wife's adultery—two points upon which she principally relied in her answer. I was about to dismiss the petition, but counsel for the husband asked that the prayer of the petition should be converted into one for a judicial separation. No objection was made by Mr. Waddy to an amendment of the prayer, which of course the Court can always do, but he objected that if the prayer was amended the petitioner ought not to be allowed to obtain a judicial separation. Of course that is the right form of objection to take, because if the petition were simply dismissed there would be nothing to prevent a fresh suit for a judicial separation, and the matter would all have to be gone into over again, and unless an amendment were made considerable expense would be incurred. The point thus raised I regard as one of extreme difficulty, namely, whether desertion on the part of the husband bars his claim to a judicial separation on the ground of his wife's adultery. The point really is, What would the Ecclesiastical Courts have done in such a matter, or rather, what ought to be done at the present day, having regard to the principles which would have been applied by the Ecclesiastical Courts in such a case? The section which governs this matter, namely, the 22nd section of the Act of 1857, says: "In suits and proceedings, other than proceedings to dissolve any marriage, the said Court shall proceed and act and give relief on principles and rules which, in the opinion of the said Court, shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts have heretofore acted and given relief, but subject to the provisions herein contained and to the rules and orders under this Act."

It is not now proposed to act exactly upon the same principles, but upon such principles or rules as in the opinion of the Court are as nearly as may be conformable to the principles and rules which the Ecclesiastical Courts have hitherto applied. That being the position of affairs, the first thing to determine is what are the facts as found. I have found that this adultery was a consequence of the husband's desertion and conduct. When I have to deal with people in this class of life, and when I have to deal with a woman who has allotted to her 7*s*. a week, and out of that has to support herself and possibly also the child, although there was some evidence that her parents were helping her, I am dealing with a class of person to whom desertion such as this, for thirteen or fourteen or fifteen years—it is a very long period—means that they are exposed to such temptations in one way or another that it is quite easy, and almost natural, to say that their adultery is the consequence of the husband's desertion. It may be different in other classes of life, but, with this class of person, I am satisfied that the right conclusion to come to is that the conduct of the husband in the present case was that which brought about the fall and the adultery of the wife. That being the fact, one has to see what is the position in which these parties are when one endeavours to apply such principles as may be conformable to the principles upon which the Ecclesiastical Courts acted. First of all, there was one principle which sometimes seems to have been thought restrictive. It is stated in what is said to have been a maxim of the Ecclesiastical Courts: "Id ita accipi debet, ut ea lege quam ambo contempserunt neuter vindicetur. Paria enim delicta mutuâ pensatione dissolvuntur." This maxim appears to have been taken from a passage in the Pandects (24. 2. 12) (1) which deals with the question of dower, and could not be applied directly to questions of right to divorce owing to the entirely different position with regard to divorce in Roman times, based upon the power of repudiation, compared with divorce granted by a Court in modern times, and certainly the succeeding passage in the Pandects shews that on this subject of dower this restrictive maxim was not the only one applicable to the subject. It is: "Hac de causa cum mulier viri lenocinio adulterata fuerit, nihil ex dote retinetur. Cur enim improbet maritus mores, quos ipse aut ante corrupit aut postea probavit? Si tamen ex mente legis sumet quis, ut nec accusare possit, qui lenocinium uxori præbuerit, audiendus est." This of course is dealing with far worse matters than conduct conducing to adultery, but the principle underlying it has a bearing on the present question; and, adopting the aforesaid maxim in certain cases, the Ecclesiastical Courts held, where it was the same class of fault as that complained of, that it was to be treated as an answer. That doctrine is termed compensatio criminis. But I am perfectly satisfied that it does not supply an exhaustive canon. To give one case: it was decided that a person who had been guilty of adultery could not maintain an action for cruelty. That is on the authority of *Drummond* v. *Drummond*. (2) That is not, however, strictly a case of the same fault. Again, the doctrine on which condonation and connivance are held to be bars do not depend upon any such maxim; yet still I find that in certain cases where a divorce a mensâ et thoro, or, as it is now termed, a judicial separation, on the ground of adultery was granted it was held that cruelty could not be pleaded in recrimination to a charge of adultery and as a bar to a divorce for such adultery, because the delictum was not the same. The authorities for that will be found collected in Rogers' Ecclesiastical Law, 2nd ed. p. 372. It is quite sufficient to refer to one of them: *Harris* v. *Harris.* (1) But I do not think it is at all clear from any of those cases that the Courts were considering questions of adultery caused by the cruelty which was set up in the answer. Cases were cited to me by Mr. Gwynne Hall in which it was said that even malicious desertion was not a bar to a suit for a divorce a mensâ et thoro on the ground of adultery. One of them is the case of *Sullivan* v. *Sullivan.* (2) But that case is one in which there is a very important passage in the judgment, shewing what I think was in the minds of some of the judges at that period. I doubt as to how far that doctrine could be pressed, because at p. 302 there is this passage: "It has been argued that the husband's going, and his long sojourn, abroad amounts to a malicious desertion of the wife; and that this should operate as a bar. Now here, in the first place, I am still to learn, that even a malicious desertion of the wife by the husband, is any bar to a sentence of divorce prayed by the husband for adultery committed by the wife. By the law, indeed, of some countries, malicious desertion is a substantive ground for divorce at the prayer of the wife against the husband; but not even there, that I am aware of, it licenses adultery on the part of the wife, by precluding the husband from a sentence of divorce on proof of its commission. Certainly, however, that neither is, nor ever has been, a doctrine of the law of this country; which also, as it is well known, has not recognised even malicious desertion as a substantive ground of divorce."

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(1) Pothier, vol. ix. (ed. 1821), Paris. The references to the Digest are (24. 3. 39) and (24. 3. 47).

(2) (1861) 2 Sw. & Tr. 269; 30 L. J. (P. & M.) 177.

Then there was a case of *Morgan* v. *Morgan* (3), where Dr. Lushington said, referring to that case: "I have not been able to find a single instance of an actual decision upon the point; two cases were cited in argument, *Reeves* v. *Reeves* (4) and *Sullivan* v. *Sullivan* (5); but in those cases the learned judge declared that there was no wilful and deliberate desertion, so that the point was not actually decided. But I find, from my own notes, that on the admission of the allegation in *Reeves* v. *Reeves* (4), Sir John Nicholl expressly declared that a wilful desertion of a wife was no bar to a suit against her for adultery; and in *Sullivan* v. *Sullivan* (1) the doctrine is repeated"; and he says what I have just referred to in the case of *Sullivan* v. *Sullivan*. (1) Then there is the case of *Reeves* v. *Reeves*. (2) The passage is this: "The only question then is, whether the husband, not maliciously deserting his wife, but under the conviction of her adultery, leaving her without provision, not having the means of supporting her, is barred of his remedy. I do not find any of the cases cited go this length. The Court is to administer the law, not to make it:—if the husband connives at, or acquiesces in adultery,—the law is clear, he loses his remedy, volenti non fit injuria;—still more so, if he actively promotes it. But, to say that a husband quitting his wife because he is convinced of her adultery, and only waiting for full proof before he institutes proceedings, and not supporting her because he had no means of doing so, is guilty of connivance, would be to state a principle void of authority." So far as they go those cases tend to shew that mere desertion would not have been itself a bar to a suit for a divorce a mensâ et thoro on the ground of adultery. But the subject is by no means exhausted by those cases; for if the first of those cases—*Sullivan* v. *Sullivan* (1)—be looked at, it will be seen what class of case the Court was dealing with. I do not intend to go through the whole of it, but it is a sort of suit in which you find a young man sent away from the society of his wife by his parents; and I think the case in Curteis' Reports is a case of the same character. *Morgan* v. *Morgan* (3) is not at all analogous with the case before me, and I am under the impression, although I have not verified it with sufficient accuracy to be sure about it, that the case of *Reeves* v. *Reeves* (4) is of the same character. All those cases do go, to a certain extent, in the direction that Mr. Gwynne Hall contended; but, as I have said, they do not exhaust the subject. In the first place, the principle of compensatio criminis has been very much questioned and pointed to as unsatisfactory in several cases, and, as I have already shewn, it is not applicable always. There are comments upon it by Dr. Lushington; and, in the Court of Appeal, in the case of *Otway* v. *Otway* (1), the judgment conveniently gives Dr. Lushington's views about the matter in his judgment in *Dillon* v. *Dillon*. (2) Cotton L.J., passing on from that judgment, said (3): "In my opinion the true principle is this, that a wife having been guilty of adultery, has put herself in such a position that she cannot be considered as an innocent party in any proceedings which might have been taken in the old Ecclesiastical Courts, or which might now be taken in the Court of Divorce; and therefore on that ground she is not in a position to come to that Court to give her any relief as to any matrimonial offence which the husband may have committed, or to put it on the ground of compensation for a crime of the same nature." And the other judges gave judgment, and treated the observations of Dr. Lushington in the same way, and Lopes L.J. points out this: "I can find no authority for that proposition, and it is opposed to what I believe to be the principles upon which the Ecclesiastical Courts have acted in granting decrees for a divorce a mensâ et thoro, viz., that a wife or husband seeking such relief must come to the Court with a pure character and must be free from any matrimonial misconduct."

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(1) (1829) 2 Hagg. Ecc. 376, at p. 414.

(2) 2 Add. 299, at p. 302.

(3) 2 Curt. 679.

(4) 2 Phil. 125.

(5) 2 Add. 299.

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(1) 2 Add. 299.
(2) 2 Phil. 125, at p. 129.
(3) 2 Curt. 679.
(4) 2 Phil. 125.

So much for comments upon the doctrine of compensatio criminis. There are these other observations to make about this class of case. The first point is that one can understand that the reason why in some of these cases cruelty has been held not to be a bar was because the cruelty was committed at some time when the parties were living together, and the moment that the wife chose to separate she could at once take proceedings in the Ecclesiastical Courts on the ground of that cruelty, and therefore it is no use afterwards to say, when she is charged with subsequent adultery, that was after the cruelty on the part of the husband, because she had her remedy at the time, and had no reason to become a person who was herself guilty of matrimonial misconduct. Those considerations are not strictly applicable to cases of desertion.

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(1) 13 P. D. 141, at p. 149. (2) (1842) 3 Curt. 86.
(3) 13 P. D. at p. 150.

In a case of desertion, the offence commences with the act of desertion, and after that the wife is left, and at the time when the Ecclesiastical Courts were dealing with these matters they could have given no remedy for the desertion. It was not until the Act of 1857 that desertion for a certain period was made a ground of relief. Of course we all know that that really was the outcome of what was thought right by different persons from time to time, and ultimately came to be embodied in an Act of Parliament, which is the Act of 1857. I find a reference, as far back as when Paley wrote his Principles of Moral and Political Philosophy, in which he considered that malicious desertion should be made the ground of divorce, and that ultimately came to be the state of things. What, then, is to be done in a Court, acting, as nearly as it may do, conformably to the principles which the Ecclesiastical Courts had to apply in the ages gone by? There are one or two cases which I have not yet referred to which throw a considerable light on this matter.

The first of these is *Forster* v. *Forster* (1), where it is said: "This species of malicious desertion is a ground of divorce in some countries—certainly not so here,—and still less will it justify a wife, in a resort to unlawful pleasures, that lawful ones are withdrawn. It is not however to be considered as a matter perfectly light in the behaviour of a complaining husband, that he has withdrawn himself without cause, and without consent, from the discharge of duties that belong to the very institution of marriage; and if he has so done, he ought to feel less surprise, if consequences of human infirmity should ensue."

The other is the case of *Harris* v. *Harris*. (2) At p. 414 of the judgment in that case this passage occurs: "The principle which I find established as applicable to the present case, is, that connivance and collusion destroy all claim to a remedy by way of divorce. This was held in the case of *Forster* v. *Forster* (1) and in a variety of other cases; and it is founded on the obvious principle, that no man has a right to ask relief from a Court of justice for an injury which he was

(1) (1790) 1 Hagg. Cons. 144.

(2) 2 Hagg. Ecc. 376, at p. 414.

chiefly instrumental in effecting himself. Volenti non fit injuria. This principle is very clearly established; but what degree of neglect, however culpable, short of an actual and voluntary exposure of the wife to the seduction of an adulterer, would be sufficient, in order to bar a suit for divorce by reason of adultery, is nowhere laid down, at least with that distinctness and precision which would furnish a safe guide for the Court to act upon. The Court certainly does not recollect any case of the kind; but it can conceive that a case might arise of such wilful neglect, or rather exposure, as might, without proving actual connivance, possibly bar the husband of all remedy by a divorce. A husband might introduce his wife to society so abandoned, and expose her to risks so great, as to render a deviation from the paths of chastity the most probable, if not the necessary, consequence. Under such circumstances, perhaps, the Court would not wait for proof of actual connivance on the part of the husband, but would hold him to the consequences of his own conduct, when the adulterous connection arose from the society and temptations to which he had introduced his wife."

The late President had to consider this matter in two or three cases. The first of those is *Duplany* v. *Duplany*. (1) After examining some, but not all, of those cases to which I have referred, he thought that he could not grant the relief that was sought in that case, but held that the petitioner was entitled to a decree of judicial separation. In giving judgment, however, he pointed out: "I am not blind to the argument that a new matrimonial offence was created by the Act of 1857, and that, therefore, it ought to be added to the list of matrimonial offences which, in the Ecclesiastical Court, constituted a bar to a petition for judicial separation. But that argument ought not to prevail against what appears the clear intention of the Act of 1857, namely, to leave petitions for judicial separation to be decided as they would have been decided in the Ecclesiastical Courts." I do not think that Lord St. Helier meant to tie himself down to the exact form of the decision in the Ecclesiastical Courts, because s. 22, as I have already pointed out, says that these matters are to be decided upon principles as nearly conformable as possible to Ecclesiastical Court principles; and, therefore, taking into consideration the changed positions which the Act of 1857 has effected in what are now treated as matrimonial offences, for which relief can be obtained, he proceeds: "But supposing that I thought that desertion constituted a defence of some kind to a petition for judicial separation, could it be more than a discretionary defence? I do not think so. The Act of 1857 makes it only a discretionary defence, where it makes it a defence at all, and the matter cannot be put higher than on the intention of the Act. If this is a matter of discretion, on the best consideration I have been able to give to the case, I should not allow the conduct of the wife, though it amounted to desertion without reasonable excuse, to be set up as a defence to her petition for judicial separation. I cannot think that it ought so to be regarded, because though she left her husband, that did not, in my opinion, justify his conduct, nor can it be said, in any proper sense, to have conduced to it." In that sense that case differs from the one at present before me; but then, again, there is very much the same class of observations made in the case of *Synge* v. *Synge* (1), and those to which I think it is necessary to refer are at p. 205: "It is clear that the Ecclesiastical Courts would have refused a decree to a wife who was guilty of adultery. That was decided in the case of *Drummond* v. *Drummond* (2), and, after 1857, in the case of *Otway* v. *Otway* (3), which followed *Drummond* v. *Drummond*. (2) Perhaps the Ecclesiastical Courts would have gone further, and in a case of such conduct as conduced to adultery when that was the basis of the petition for judicial separation it is possible, I think, that the Ecclesiastical Courts might have refused a decree; though I do not desire to lay that down for certain. I say that because the case of *Boreham* v. *Boreham* (4) appears to me to indicate that that might possibly have been the law. I do not say it goes so far as to decide it, because in

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(1) [1892] P. 53.

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(1) [1900] P. 180, at p. 205.

(2) 2 Sw. & Tr. 269; 30 L. J. (P. & M.) 177.

(3) 13 P. D. 141.

(4) (1866) L. R. 1 P. & M. 77.

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Boreham v. *Boreham* (1) cruelty was proved, and cruelty no doubt was a matrimonial offence. But stress was laid on the neglect causing the misconduct, and it appears to be so reasonable to say that if one party is guilty of conduct which causes or conduces to the misconduct of the other, that that party cannot be allowed to allege that misconduct or to obtain relief for it. It seems so reasonable that, without further mentioning the matter (it is not necessary to decide it now), I am not prepared to say that the Ecclesiastical Courts might not have refused a divorce a mensâ et thoro on the ground of misconduct if it were shewn that that misconduct was brought about by conduct on the part of the petitioning party. Then I shall not dispute that the Ecclesiastical Courts would refuse a judicial separation where collusion was proved." But then he goes on further to say, when he comes to his conclusion, "Therefore, I put it solely upon this,—that she has been, as I think, guilty of desertion; but I do not think that this is a ground for refusing a judicial separation." Just before that, however, he says: "But I do not say she has been guilty of conduct conducing to his adultery." It is quite clear, therefore, that he decided that case upon the previous cases on the ground that mere desertion would not be sufficient. One has, therefore, to consider what is the true position. I think considerable light is thrown upon it by a decision in the House of Lords in *Simmons' Divorce Bill.* (2) The head-note to the report is this: "A husband lived separate from his wife for many years without making any provision for her maintenance from his means which were sufficient:—*Held* not to be entitled to a divorce," and the bill was rejected. That was in the year 1845—of course, before the Act of 1857—and Lord Brougham said: "On the evidence that their Lordships have heard the petitioner was not entitled to the relief which he had prayed for. Their Lordships could not entertain any doubt of the wife's adultery, but they were to look to her husband's conduct also and say whether that did not disentitle him to the relief asked of their Lordships." I do not say, of course, that that case is one in which one could find the exact principles of the Ecclesiastical Courts; but it is a very strong guide for the right view to take in a case of this kind, because it is what was thought by the House of Lords in moving for an ordinary divorce bill, and it shews what was the attitude which was taken up in connection with these matters at a time before the Act of 1857. Of course it is not applicable to a divorce a mensâ et thoro only, but it shews the ground on which it is reasonable to approach the consideration of such a matter. There is one other case which I should like to refer to, and that is *Dillon* v. *Dillon* (1), where Dr. Lushington said, at p. 94 of the report: "Is the doctrine thus established affected by pleading that the cruelty was committed with the ulterior design of getting rid of the wife by driving her to the commission of adultery, is it connivance? I think it is not. There may by possibility be cases where cruelty on the part of the husband may directly lead up to the wife's adultery; I say nothing upon such a case." Well, that is in 1841; and if such a point as conduct bringing about adultery was not really considered as determined then, I have to see what was determined, when I have to consider what are the principles conformable to the principles upon which they would have endeavoured then to act if the matter had come forward, the matter being a matrimonial offence.

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(1) L. R. 1 P. & M. 77.

(2) (1845) 12 Cl. & F. 339.

After the best consideration I can give to this case, it appears to me that, acting upon the principles conformable to the principles upon which the Ecclesiastical Courts would have acted, it would be wrong to hold that a petitioner whose conduct has brought about his own wife's fault should be allowed to come forward years afterwards and obtain a judicial separation against her in this country. It would be really taking advantage of his own wrongful act to get a decree for a fault which had been produced by his own conduct, and I am not going to be the first to lay down that that is to be the law of this country. It appears to me that it would be contrary to all reasonable principles that that should prevail; and therefore

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(1) 3 Curt. 86, at p. 94.

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my view is that this petitioner is not entitled to obtain a decree of judicial separation in this case. What he wants it for I am at a loss to understand, because he has been separated from his wife for many years. Whether he hopes that he may get rid of the order which has been in force against him for her maintenance all this time, I am not quite sure. Possibly some motive of that kind may be present to his mind. Therefore I think the proper course is to allow the amendment to the prayer of the petition; but I refuse to grant the relief asked for in that amended prayer, and I dismiss this petition with costs.

Solicitors for petitioner: *Jaques & Co., for Neill & Holland, Bradford.*

Solicitors for respondent: *H. G. Campion & Co., for Arthur Neal, Sheffield.*

H. D. G.

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July 3

Divorce—Desertion and Adultery of Husband—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 *Vict. c.* 39), *s.* 5 (*a*)—*Effect of Order made under Act.*

An order made under the Summary Jurisdiction (Married Women) Act, 1895, cannot extend, abridge, or alter the jurisdiction of the Divorce Division of the High Court of Justice under the Matrimonial Causes Acts; and s. 5 (*a*) of the Act of 1895 is to be read with the qualification that no order made under that Act can be treated as in any way ousting the jurisdiction of the Divorce Division.

This was a petition by the wife, Minnie Smith, for the dissolution of her marriage with Arthur James Smith, on the grounds of his alleged adultery and desertion.

The parties were married on November 25, 1896, and in January, 1897, the husband refused to live in the house provided by his wife and had ever since lived separate and apart from her, though she stated that she was at all times willing to cohabit with him.

On March 5, 1897, the wife obtained a separation order and allowance under the Summary Jurisdiction (Married Women) Act, 1895; and on October 16, 1903, the husband succeeded in getting the amount of the allowance reduced from 10*s.* to 6*s.* a week.

On February 19, 1905, he wrote to his wife to the effect that he might not be remaining in England; that he had "been walking out" with a girl for the past three or four years; and that the girl was shortly to be confined. This last event actually happened on March 4, 1905; and the petitioner alleged that her husband was the father of the child.

The learned judge having expressed doubt as to whether the necessary period of two years for statutory desertion under the Matrimonial Causes Act, 1857, had been proved,

Bayford, for the petitioner. The petitioner has been willing to live with her husband. The allowance under the separation order, though it has been paid, has not been paid punctually, and on one occasion the respondent went to prison in default.

[BARGRAVE DEANE J. Can desertion be alleged during the time when a separation order is in force?]

Can it be said that it was the intention of the Legislature that if a wife takes advantage of the provisions of the Summary Jurisdiction (Married Women) Act, 1895, that is to be a licence to the husband to commit adultery with impunity? Desertion is a continuing offence. [He referred to *Kay* v. *Kay*. (1) and the cases there cited.]

BARGRAVE DEANE J. The Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), enacts that there must be desertion for two years and upwards. The relief afforded by the Summary Jurisdiction (Married Women) Act, 1895, may be obtained, if the wife chooses to take advantage of it, after desertion for any period, however short. The petitioner has taken advantage of the Act of 1895, and I fail to see how desertion can run on after the date of the separation order.

Cur. adv. vult.

July 3. BARGRAVE DEANE J. In this case I took time to consider my decision, and as an important question arises as to the construction of the Summary Jurisdiction (Married Women) Act, 1895, which has so far not been formally decided, I have consulted the President with a view to uniformity of decision. [The learned judge then recapitulated the facts and read the order of the justices, and proceeded:—] They do not find, in terms, that there was desertion in fact, though the form of order used states that the wife has complained of desertion. That is not very material. The words of s. 4 of the Act are: "Whose husband shall have deserted her, or whose husband shall have been guilty of persistent cruelty to her or wilful neglect to provide reasonable maintenance for her . . . . and shall by such cruelty or neglect have caused her to leave and live separately and apart from him."

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(1) [1904] P. 382.

Then, by s. 5, the justices may, upon proof of these matters, make an order which shall have the effect in all respects of a decree of judicial separation on the ground of cruelty. It does not say on the ground of desertion. The wife now says in effect that her husband never came near her and refused to live with her, and that she had to take proceedings against him for failure to comply with the order. And she says that she was ready and willing to live with him all the time if he would live with her. No doubt the order was in full force all the time, but jurisdiction to make that order had been conferred upon the magistrates merely by the fact that the husband had refused to live with his wife for about two months. Now it turns out that since 1902—that is to say, for some years—the husband has been living in adultery; but she did not know of that before, and therefore had no complaint other than that she made before the justices.

That complaint suggested no ground for a judicial separation under the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), which is not granted for mere neglect, but on desertion, which must, however, have continued for two years at the least. It cannot be the object of the Act of 1895 to enable magistrates to make orders which this Court is bound to take cognizance of as ousting its jurisdiction, and it could not have been intended by that Act to extend, abridge, or alter the jurisdiction of this Court. I do not think that desertion within the purview of that Act is desertion that this Court can take cognizance of. What, for instance, is the effect on the husband? The effect of a decree of judicial separation in this Court would be that he would be guilty of contempt of Court if he attempted to return to his wife while she desired to prevent him coming near her—a consequence which could not accrue in respect of an order made by the justices. Here we have a manifest exception to the effect of a decree of judicial separation, which effect, nevertheless, the Act says the magistrates' order is to have.

The case is an illustration of the great desirability of the ample consideration by Parliament of the effect of its legislation. If an Act like this is to operate in lieu of, and to

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alter or enlarge, the powers of this Court, it is a remarkable circumstance that the Matrimonial Causes Act, 1857, is not mentioned in this Act—much less repealed in any of its sections.

What, then, am I to do with the case of this woman, who has been deserted since 1897? Here is a man who never approached his wife, but continued to keep away from her and to commit adultery. I am forced to conclude that this decision of the justices is a nullity so far as it affects the jurisdiction of this Court, and was only intended to operate for her protection at the time when it was made. I can ignore it. He has been, in fact, away from her for two years under such circumstances that the Court is, I think, entitled to find desertion established.

I therefore, as there can be no possible doubt as to the adultery, grant a decree nisi, with costs.

Solicitors: *Nicholson, Graham & Beesly, for Heygate & James, Wellingborough.*

H. D. G.

[IN THE COURT OF APPEAL.]

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CONSTANTINIDI *v.* CONSTANTINIDI AND LANCE.

Dissolution of Marriage—Wife's Adultery—Husband's Adultery—Variation of Settlements—Discretion of Court—Conduct of the Parties—Interests of Public Morality—Retrospective Order—Repayment of past Income—Wife's protected Life Interest—Jurisdiction — Matrimonial Causes Act, 1857 (20 *&* 21 *Vict. c.* 85), *s.* 45; *Matrimonial Causes Act,* 1859 (22 *&* 23 *Vict. c.* 61), *s.* 5; *Matrimonial Causes Act,* 1878 (41 *&* 42 *Vict. c.* 19), *s.* 3.

In exercising the discretionary jurisdiction conferred upon the Court of varying settlements after a dissolution of marriage, regard must be had to the conduct of both the husband and the wife, and not of one party only, and also to the interests of public morality and decency.

A marriage had been dissolved at the suit of the husband on the ground of his wife's desertion and adultery, notwithstanding that the husband had, both before and after the presentation of his petition, himself been guilty of adultery, as was in fact admitted at the trial, he declining to tender himself for cross-examination. Both husband and wife had executed marriage settlements of their respective properties, the wife's settled property considerably exceeding the husband's. There were no children of the marriage.

Upon a petition by the husband for variation of the wife's settlement, under the discretionary power given to the Court by s. 5 of the Matrimonial Causes Act, 1859, as amended by s. 3 of the Matrimonial Causes Act, 1878, with a view to obtaining a direction for payment to him of part of the income of her settled property:—

Held, that, having regard to the admitted and unexplained misconduct of the husband himself and to the interests of public morality, the case was not one in which the Court should exercise its discretionary power by varying the wife's settlement in his favour.

The principles which should guide the Court in exercising its discretionary power of varying settlements considered and stated.

Chetwynd v. *Chetwynd*, (1865) L. R. 1 P. & M. 39, and *March* v. *March and Palumbo*, (1867) L. R. 1 P. & M. 440, considered and applied.

Noel v. *Noel*, (1885) 10 P. D. 179, distinguished.

The jurisdiction given to the Court to vary settlements under the Matrimonial Causes Acts cannot be exercised retrospectively; as, for instance, by directing the trustees of the wife's settlement to recoup to the husband accumulations of past income received by her under the trusts of his settlement.

A wife's protected life interest—that is, a life interest the personal enjoyment of which is to cease in certain events—is not an interest which the Court can control under s. 5 of the Matrimonial Causes Act, 1859,

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though the existence of such a life interest may be taken into consideration by the Court when making an order for variation of settlements.

Decision of Jeune P. reversed.

APPEAL from a judgment of the late Sir Francis Jeune P. varying the registrar's report as to the variation of settlements after a decree absolute for dissolution of marriage. The circumstances under which the learned President pronounced a decree nisi are already reported (1), but for the purposes of the present report a short statement of the facts, partly taken from the judgment of the learned President in that report, will be convenient.

The husband and wife were married on October 26, 1889. They made the acquaintance of the co-respondent in 1896. Before that time the husband and wife had lived on terms of great affection; but in the autumn of that year the co-respondent and respondent met in the country at the house of her father, whose medical adviser the co-respondent was; and when the husband returned from a visit to Switzerland in October, 1896, a marked coldness was exhibited by the wife towards her husband, and marital intercourse was refused by her. In January, 1897, the wife left her husband and went to Ireland, with the intention of never returning to him. In December, 1899, the husband obtained a decree of judicial separation on the ground of desertion, the wife offering no real defence. In February, 1901, she went to Sioux Falls, in the State of Dakota, and so commenced a residence intended to qualify her for a divorce under the laws of that State. She obtained such a divorce in February, 1902, and almost immediately afterwards married the co-respondent, who had joined her in Dakota, and thenceforward cohabited with him.

On July 3, 1902, the husband presented his petition for dissolution of marriage and for damages. On December 18, 1902, the respondent filed her answer charging the petitioner with having committed adultery with a woman of notoriously loose character on five specific dates from August 7 to 30, 1901; and the answer went on to charge the petitioner with further acts of adultery committed with the same woman on dates in 1902 (not "1901," as stated in the former report) subsequent to the presentation of the petition, namely, on September 13, 18, 21, 24, and 29, and November 3, 14, 15, and 20.

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(1) [1903] P. 246.

The petitioner contented himself simply with a reply denying the charges of adultery; but at the trial before Sir F. Jeune and a special jury he did not venture to tender himself for cross-examination, and it was proved that he had committed adultery with the woman named in the respondent's answer, and in fact his counsel admitted the accuracy of the various allegations of adultery. The jury found that the respondent and co-respondent had committed adultery together, and that the petitioner had also committed adultery. The damages were assessed at 25,000*l.*

Upon these findings the learned President, under the discretion conferred by s. 31 of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), in a considered judgment pronounced a decree nisi dissolving the marriage, as already reported.

The respondent and co-respondent each gave notice of appeal, but their appeals were abandoned. There had been no issue of the marriage.

On March 11, 1904, the husband presented a petition for the variation of the settlements made on his marriage with the respondent. These settlements were two in number, one being an ante-nuptial settlement made by the respondent and dated October 23, 1889, and the other a post-nuptial settlement made by the petitioner and dated February 1, 1890. By the respondent's settlement, securities to the value of 51,000*l.*, yielding an income of 2200*l.* per annum, were settled upon trust, after the then intended marriage, to pay the income to the respondent during her life, but during her intended coverture without power of anticipation; and after her death upon trust, as to both capital and income, for her children and remoter issue by her then intended marriage or any after-taken husband as she should by deed or will appoint; and in default of any such appointment in trust for her children at twenty-one or marriage in equal shares; and in default of children of the respondent, upon trust to pay the income to any husband surviving her, during his life; and subject thereto upon trust as to capital and income for the respondent's father. And the settlement contained an agreement for the settlement upon the same trusts of any after-acquired property of the respondent.

By the petitioner's settlement securities of the value of 10,000*l*., yielding an income of nearly 400*l*. per annum, were settled upon trust to pay the income to the respondent during her life for her separate use without power of anticipation, and after her death to the petitioner for his life, and after the death of the survivor, as to both capital and income, upon trust for the children and remoter issue of the marriage as the petitioner and respondent should by deed, or as the survivor should by deed or will, appoint; and in default of appointment in trust for the children of the marriage at twenty-one or marriage in equal shares; and in default of children, for the petitioner's next of kin.

Under the will, dated October 23, 1901, of her father, who died on April 3, 1902, the respondent became entitled during her life for her separate use, but subject to the life interest of her mother, to the income arising from one-seventh, about 150,000*l*., of his residuary estate, but her life interest was made determinable if (inter alia) she "shall do or suffer any act or thing or any event shall happen whereby, if the said income were made payable to her for life, she would be deprived of the right personally to receive and enjoy the same or any part thereof, or some other person might become entitled to receive the said income or part thereof," with a discretionary trust (in case of the happening of any such event) during the residue of her life in favour of her children, and, if none, then in favour of her brothers and sisters, and nephews and nieces: with an ultimate trust, in default of children, for her next of kin as if she had died intestate without having been married. Under the will the respondent was entitled, upon the happening of certain events, to a similar interest in other shares of her father's residuary estate.

In his petition for the variation of the two settlements the petitioner, after stating the above facts, went on to allege that the value of the residuary estate of the respondent's father was upwards of 1,068,000*l.*: that the petitioner's total net income from all sources was about 250*l.*: that since January 31, 1897, when the respondent deserted him, she had been in receipt of the income of the whole of the property comprised in the two settlements with the exception of four payments made in 1901 and 1902 amounting altogether to 1234*l.*, while he, the petitioner, continued liable for the annual sum of 430*l.*, for rent and taxes in respect of the house in London which had been taken on the footing of the joint income, besides heavy expenses for the upkeep of the house: that the co-respondent had paid no part of the 25,000*l.* damages assessed by the jury at the trial of the petition for dissolution of marriage, and had no property out of which the same could be satisfied; and also that neither the respondent nor the co-respondent had paid any part of the costs to which he, the petitioner, was entitled under the proceedings.

The petition then asked that the respondent's settlement might be varied by extinguishing all her interests and powers during the petitioner's lifetime, and that the trustees of that settlement might be ordered to pay to the petitioner during his life the annual income of the settled property; and that the trustees of the petitioner's settlement might be ordered forthwith to reconvey to him the property thereby settled, freed from the trusts of the settlement and for his own use and benefit.

In her affidavit filed against the petition the respondent again charged the petitioner with having committed repeated acts of adultery, and these were not denied by him.

On June 20, 1904, the decree nisi was made absolute, and shortly afterwards the respondent married the co-respondent Lance according to English law.

The petition for variation having been referred to the registrar for report (1), he, on November 9, 1904, after hearing counsel for both parties, made his report, which commenced by stating that the decree nisi obtained by the petitioner dissolving his marriage with the respondent on the ground of adultery, "notwithstanding the verdict that the petitioner was also guilty of adultery," had been made absolute. Then the report went on to state that there was no issue of the marriage: that by her settlement the respondent had brought into settlement property of the present value of 51,000*l.* and had covenanted to settle after-acquired property, and that, subject to the life interest of her mother (then living), the respondent was entitled to a one-seventh share of her father's residuary estate stated to be upwards of 1,068,000*l.* in value: also that under the petitioner's settlement 10,000*l.* brought into settlement by him was held in trust for the respondent for life, on her death for the petitioner for life, and on the death of the survivor, in default of issue, for the persons entitled to the estate of the petitioner as if he had died intestate a widower: that the income from the 10,000*l.* was now 400*l.* per annum, and that the petitioner admitted an income of about 250*l.* The registrar then submitted that the Court should, with consent, order that from and after the date of such order all the interests and powers of the respondent under the petitioner's settlement should be extinguished as if the respondent had died in the lifetime of the petitioner, and that the trustees of that settlement should reconvey the property comprised therein to the petitioner. The report then proceeded as follows: "It is contended on behalf of the petitioner that he should be put in an equal position with the respondent as to means, and that the respondent's settlement should also be varied so that the petitioner should receive the whole, or at least a portion, of the income arising from the respondent's trust funds; and attention was called to the facts that the respondent has now married the co-respondent, and that the damages of 25,000*l.* and the costs against the respondent have not been paid. But, having regard to the verdict of the jury of adultery against the petitioner, to there being no issue of the marriage, and to no necessity being shewn for providing for the petitioner out of the wife's trust funds, it is submitted that no order should be made as to variation of the respondent's settlement of October 23, 1889." The petitioner then moved to vary the report except so far as it, by consent, extinguished the interests and powers of the respondent under the petitioner's settlement.

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(1) See [1904] W. N. 122.

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The motion was argued before Sir Francis Jeune P. (1), who, in delivering judgment on December 5, 1904, said the effect of the cases, such as *March* v. *March and Palumbo* (2) and *Noel* v. *Noel* (3), was that where a wife had broken up a house by her misconduct, and there were consequent variations of the settlements, it was justifiable and right to give to the husband, supposing his means were inadequate otherwise, whatever portion was thought right of the income derived from those settlements, and for two reasons: first, in order that there might be restitution—he would not say of income, but of some kind—to a position like that he would have held, sharing the wife's fortune, if by her misconduct the married life had not come to a termination; and, secondly, on the broad principle that the co-respondent was not to be allowed to make any pecuniary profit out of his own iniquity. He also thought the authorities went a little further, and to this extent, that, in considering the sum (if any) to be allowed, the conduct of the parties was to be taken into consideration—that is, the conduct of the parties in regard to the dissolution of the married life which had taken place. That is to say, supposing one party were found to be wholly to blame, as in the case of a guilty wife against whose husband nothing was to be said, the conduct of the wife was to be looked at; or, if the husband had contributed in a material degree to the divorce, whether wholly by being a guilty party, or partially by being to some extent guilty in contributing to the fault on the part of the wife, all those were matters that might fairly be taken into account in considering what was to be done respecting the arrangement between the parties, having regard to their moral conduct in respect of the cause which had brought about the apportioning of the money at all. As to the registrar's report, the learned judge did not see that the adultery of the husband, which did not bar him from a divorce, should nevertheless bar him from the results of a divorce. No doubt the husband had committed adultery of a shameless kind, but though he had committed shameless adultery he was not altogether to blame in the matter: some portion of the blame attached to the wife. Having thought it right to allow the divorce and not having allowed the husband's adultery to be a bar to it, it seemed to the learned judge impossible to say it should be a bar to his obtaining the natural and proper results of the divorce which had been really brought about by the wife. The learned judge could not therefore agree with the registrar as to the rights of the husband. Then, after saying that his decision would be entirely independent of the question of the non-payment of the 25,000*l.* damages and costs, the learned judge proceeded from the figures before him to apportion the payments which he considered ought to be made as between the petitioner and the respondent. The respondent's reversionary interest in one-seventh of her father's residuary estate—that is, in about 150,000*l.*—must be taken into consideration. The petitioner's present income, derived from a sum of 10,000*l.*, other than the 10,000*l.* comprised in his settlement, and from other sources, was 710*l.* a year, and the respondent's present income, derived from the 51,000*l.* comprised in her settlement, was about 2200*l.* a year. Ultimately she would have an income of some 6700*l.* a year. Then there were four sums of 500*l.* each which had been received and accumulated by the respondent since her desertion from the income of the petitioner's settlement fund, but which, in the judge's opinion, really belonged to the petitioner, amounting to a total sum of 2000*l.*: that sum ought to be repaid to the petitioner by four annual instalments of 500*l.* each. Upon the basis of these figures, the judge made an order varying the report of the registrar by directing that the trustees of the respondent's settlement should (after retaining their costs), "as from the date of this order, during the joint lives of the petitioner, the respondent and her mother, pay to the petitioner, out of the income of the funds for the time being subject to the said settlement, the annual sum of 1000*l.*, and from and after the death of the mother do thenceforth, during the remainder of the life of the petitioner, pay to him out of the said income, in lieu of the said annual sum of 1000*l.*, the annual sum of 2000*l.*, and do further pay to the petitioner out of the said income the capital sum of 2000*l.*, the said sum to be paid by equal annual instalments of 500*l.*, if and so long as the said income, after payment of the said costs and any other annual sum for the time being payable under this order, will extend to the payment of annual instalments of that amount; and if and so long as the said income will not so far extend, then by such smaller annual instalments as may be necessary, the said annual instalments to commence as from the date of this order." And it was further ordered that the trustees of the petitioner's marriage settlement should forthwith reconvey to him the property thereby settled, freed from the trusts of that settlement, for his own use and benefit absolutely; and the respondent (in respect of her separate estate) and the co-respondent were condemned in the costs incurred and to be incurred by or on behalf of the petitioner of and incidental to that application and the carrying into effect of that order.

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(1) 92 L. T. 473; 21 Times L. R. 107.

(2) L. R. 1 P. & M. 440.

(3) 10 P. D. 179.

The respondent, Mrs. Lance, appealed from so much of that order as dealt with the income of the trust funds comprised in her settlement.

The appeal was heard on June 29, July 3 and 4, 1905.

Rufus Isaacs, K.C., *Barnard, K.C.*, and *Raymond Asquith*, for the respondent, Mrs. Lance. The jurisdiction of the Court to vary settlements on a divorce depends upon the enactments contained in the three Matrimonial Causes Acts: the first, that of 1857 (20 & 21 Vict. c. 85), the second that of 1859 (22 & 23 Vict. c. 61), and the third that of 1878 (41 & 42 Vict. c. 19). (1)

(1) The following were the enactments referred to:—

The Matrimonial Causes Act, 1857, s. 45: "In any case in which the Court shall pronounce a sentence of divorce or judicial separation for adultery of the wife, if it shall be made appear to the Court that the wife is entitled to any property either in possession or reversion, it shall be lawful for the Court, if it shall think proper, to order such settlement as it shall think reasonable to be made of such property or any part thereof, for the benefit of the innocent party, and of the children of the marriage, or either or any of them."

The Matrimonial Causes Act, 1859, s. 5: "The Court after a final decree of nullity of marriage or dissolution of marriage may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property settled either for the benefit

By s. 45 of the Act of 1857, in case of divorce for the adultery of the wife, the Court was empowered, "if it shall think proper," to order a settlement of her property for the benefit of the "innocent party, and of the children of the marriage." That power was extended by the Act of 1859 to the variation of marriage settlements, for it was provided, by s. 5, that after divorce the Court might inquire into the existence of any settlements, and might vary the trusts of the settled property "for the benefit of the children of the marriage or of their respective parents as to the Court shall seem fit." Thus far the Court had jurisdiction to vary settlements only in cases where there were children of the marriage. But by s. 3 of the third Act, that of 1878, the Court is authorized to exercise the powers of variation under s. 5 of the Act of 1859 "notwithstanding that there are no children of the marriage"; and it is under those two sections that the President has purported to exercise his discretion as to variation of settlements in the present case. But in order to ascertain what the jurisdiction is, one must go back to s. 5 of the Act of 1859; and under the terms of that section the Court can only vary either for the children of the marriage or for their "parents": it does not say for "the husband or the wife"; so that if there are no children there can be no "parents" within that section; and s. 3 of the Act of 1878 does not extend the previous section to "the husband or the wife." Therefore, upon the construction of s. 5 of the Act of 1859—which must be construed strictly in dealing with such solemn instruments as settlements—it is a strong thing to say that "parents" includes persons who have never been such. Although there is no direct authority on the point, this view presented itself strongly to Lindley L.J. in *Thomson* v. *Rodschinka* (1), where he refused to extend the word "parent" to the personal representatives of the parent, holding that "parents" meant living parents. The learned

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of the children of the marriage or of their respective parents as to the Court shall seem fit."

By the Matrimonial Causes Act, 1878 (41 & 42 Vict. c. 19), s. 3 provides that the Court may exercise the powers vested in it by s. 5 of the Act of 1859 "notwithstanding that there are no children of the marriage."

(1) [1896] P. 263, 271–2.

Lord Justice there assumes that if there are no children there is no power to vary. Accordingly it is submitted, first, that the President had no jurisdiction to vary in the present case. Secondly, the President has, in ordering a variation of the settlements, acted as if the petitioner were a perfectly innocent party, and notwithstanding that his conduct was such as was characterized by him as that of "shameless adultery." He did not follow the law as laid down in a series of decisions to the effect that, in varying settlements under the jurisdiction given by the Acts of 1859 and 1878, the Court must take into consideration the conduct of the parties—that is, of both parties—as well as their pecuniary position: *Chetwynd* v. *Chetwynd* (1); *Synge* v. *Synge* (2), where the President himself stated the law. It is submitted that the President has taken a strong step in holding that a wife who refuses matrimonial intercourse thereby gives her husband just cause for committing adultery.

[STIRLING L.J. What do you say to *March* v. *March and Palumbo*? (3)]

That case, which has been discussed in *Beauchamp* v. *Beauchamp and Watt* (4) and other cases, is entirely different, for the husband was altogether blameless, and moreover there was the child to be provided for. That case shews that the Court will only exercise its jurisdiction to vary settlements in favour of an innocent husband. Here the husband has admitted fourteen specific acts of adultery, besides general acts the number of which we do not know. By his refusal to go into the box and submit to cross-examination he has deliberately chosen to abstain from coming to explain his conduct, and in fact the jury have found him guilty of adultery. Again, in her affidavit filed against the petition for variation the wife has repeated her charges of adultery, and again they have not been denied by the husband. This is, therefore, not a case in which the husband can claim to have the discretionary power of the Court as to the variation of settlements exercised in his favour. Under s. 32 of the Act of 1857, in making a provision

(1) L. R. 1 P. & M. 39.

(2) [1900] P. 180, 207.

(3) L. R. 1 P. & M. 440.

(4) (1904) 20 Times L. R. 273.

for the wife in case of a divorce, the Court is to have regard to "the wife's fortune, the ability of the husband, and the conduct of the parties." Although those words are not repeated in s. 5 of the Act of 1859, they serve to exhibit the spirit of the Legislature in those provisions, and form a fitting guide for the Court: *Chetwynd* v. *Chetwynd*. (1)

[VAUGHAN WILLIAMS L.J. What jurisdiction has the Court under s. 5 of the Act of 1859 to take away from the wife, as this order has done, the 2000*l.* which she had received before the order was made?

Priestley, K.C., for the petitioner. It is submitted that there is an equity in favour of the husband. Debts may have been contracted by the husband on the strength of the joint income. But it must be admitted that in the only case on the point, *Paul* v. *Paul* (2), it was held by Lord Penzance J.O. that the Court could not make a retrospective order.]

It is submitted that the learned judge should not have taken into account the larger income which may under her father's will accrue to the wife on the death of her mother. It is only a contingent interest which possibly the wife may never acquire, for she may not survive her mother; and by the father's will the husband is expressly excluded.

[VAUGHAN WILLIAMS L.J. The words of s. 5 are very wide. The Court is empowered to "make such orders . . . . as to the Court shall seem fit."

STIRLING L.J. Have we any power to review the exercise of discretion by the judge?]

This Court can review the exercise of discretion if there are matters which the judge failed to take into consideration.

[STIRLING L.J. In the analogous case of costs, is it not the fact that the Court will not review the judge's exercise of discretion, unless he has proceeded either on a wrong principle or on an erroneous view of the facts?]

In the case of costs the Court of Appeal has held that some material must exist on which the discretion can be properly exercised.

[COZENS-HARDY L.J. An order in the Court of Chancery for an allowance for the maintenance of an infant has always been treated as appealable.

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(1) L. R. 1 P. & M. 39, 44.

(2) (1870) L. R. 2 P. & M. 93.

Stirling L.J. I think the analogy which I suggested was not the right one. I think that which Cozens-Hardy L.J. suggested more properly applies.]

The President applied a wrong principle. The jurisdiction given to the Court is not for the punishment of the co-respondent; it is the respondent the Court is dealing with. If the President is right, it would follow that the Court ought in every case to deprive the wife of the whole of her income in order that the co-respondent should not profit by the wrong which he has done. The learned President has treated this case as one of compensation or damages for an injury. In December, 1899, a judicial separation was granted on the ground of the wife's desertion, and the parties were, as the learned judge said, separated beyond all hope of reconciliation. But desertion is not a statutory ground for the variation of settlements; for that purpose the Court can look only at the misconduct which has broken up the home. The true principle is shewn by *Noel* v. *Noel*. (1) There Hannen P. said: "When a woman by her own fault has broken up a family of which she was a part, the Court must endeavour to put the husband and the children, as far as money goes, in the same position as they would have been if she had not broken it up." The fact that, notwithstanding the husband's misconduct, the Court thought fit to exercise its discretion under s. 31 of the Matrimonial Causes Act, 1857, in favour of the husband by granting him a divorce, is no reason why his conduct should not be taken into consideration upon an application for the variation of the settlements. The learned President did not sufficiently consider the effect of the decision in *March* v. *March*. (2) Where there have been children of the marriage the Court has in some cases deprived the wife of as much as half her income. But even where the husband has been innocent, and though there have been no children, the Court has never gone so far as in the present case. In fact this is the first case in which, the husband and wife being both

(1) 10 P. D. 179, at p. 182.

(2) L. R. 1 P. & M. 440.

guilty, a variation has been made in the settlements. It is submitted the President has taken the wrong view, and that the order suggested by the registrar would be the right one to make.

Lawson Walton, K.C., and *Priestley, K.C.*, for the petitioner. The evidence shews that up to the time the husband went on a visit to Switzerland the husband and wife were, as in fact their correspondence shews, on the most affectionate terms. During his absence she met with the co-respondent, and a close intimacy with him ensued, and she ceased to care for her husband. She went away with the co-respondent in January, 1897, and she then asked her husband to agree to a separation without alleging any misconduct on his part. Though the Court cannot directly deal with the income which will come to the wife under her father's will after her mother's death, yet that income can be taken into account in dealing with the income under her marriage settlement, and the President dealt with it on the footing that the wife would ultimately have an income of 6700*l.* per annum. If the husband had had a large income, that fact would have influenced the Court in deciding how much of the wife's income should be taken away from her. The extent to which the Court will go in favour of a husband as against a guilty wife is illustrated by *Hartopp* v. *Hartopp*. (1) The President has not acted on any new principle, but on the principle which is laid down in *March* v. *March* (2), namely, that the innocent party should as far as possible be placed, as regards money, in the same position as if there had been no misconduct by the other party. The Court will also have regard to public policy. It would not be to the interest of the public that a man who gains the affections of a wealthy married woman should be able to secure a pecuniary profit for himself. The result of allowing this appeal will probably be to enable the co-respondent to get hold of the wife's income.

It is said on behalf of the appellant that the husband's conduct has been such as to disentitle him to the benefit of s. 5; but that section was intended for the benefit of a petitioner who has obtained a divorce. Notwithstanding the husband's adultery the Court granted him a dissolution of the marriage, and the Court will not go behind that decree as regards his conduct. If that conduct was not such as to disentitle him to a divorce, it ought not to disentitle him to a variation of the settlements. The wife appealed from the decree, but she afterwards abandoned her appeal, and she cannot now be heard to say that the judge exercised his discretion wrongly. And, as regards conduct, the jury considered the conduct of the co-respondent as most heartless, and gave as damages a sum of unprecedented amount.

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(1) [1899] P. 65.

(2) L. R. 1 P. & M. 440.

His discretion as to granting a divorce was exercised by the President under circumstances of an exceptional character, and the reasons for exercising his discretion in the husband's favour he fully stated in his judgment. He distinguished the case from *Synge* v. *Synge* (1) by saying that, while mere desertion by the wife would not excuse the husband's adultery, yet this was a case of aggravated desertion—a desertion for six years. Accordingly the President said that, in the circumstances, the wife could not complain of her husband's adultery, he having fallen into temptation under extraordinary trial. In directing a variation of the settlements the Court should so deal with the case as to mark its opinion of the wife's conduct, she being the party really responsible for the break-up of the home. So far as the decree is concerned, the husband must be regarded as an innocent party. There are two principles that should govern this case. The first is that a person who has done wrong, and can make compensation, must submit to the allocation of money for that object. Therefore, if the wife has by her misconduct deprived her husband of his expectations, she must pay him compensation: *March* v. *March* (2); the amount of compensation being a matter for the discretion of the Court. The second principle is that the interests of public and general morality must be regarded. A seducer of a rich wife cannot be allowed to avail himself of property he has sought to acquire by taking the position of the husband. Where such a desire is proved to exist, the Court will diminish

(1) [1900] P. 180.

(2) L. R. 1 P. & M. 440.

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the profit coming to the seducer so far as it can do so without reducing the wife to poverty. The husband is entitled to the benefits he acquired by his marriage which has been interrupted by his wife's misconduct. In the present case 1000*l.* a year is not an extravagant proportion for the wife to pay out of her large income to the husband as compensation for the loss he has sustained: he ought, surely, to receive that annual sum in preference to the co-respondent. That sum has been fixed, as well as the further sum of 1000*l.* a year when the wife's interest under her father's will falls into possession, by the judge in the exercise of his discretion; and it is submitted that no sufficient ground has been made out for interfering with that discretion.

Barnard, K.C., in reply. The rule quoted from *Noel* v. *Noel* (1) applies only where the husband is innocent and his own conduct has not contributed to the break-up of the home. That is not the case here. The party coming here to claim the exercise in his favour of the discretion vested in the Court is not an innocent party: he does not come with clean hands; and therefore he cannot claim anything out of his wife's fortune.

Cur. adv. vult.

Vaughan Williams L.J. The judgment now appealed against is a judgment given by Sir F. Jeune, upon a petition for variation of settlements, in the exercise of his discretion as the judge who tried the divorce action. That discretion was exercised under s. 5 of the Matrimonial Causes Act, 1859, as amended by s. 3 of the Matrimonial Causes Act, 1878. It has not been disputed in the argument before us that the Court of Appeal has jurisdiction to review that exercise of discretion, and I think counsel were right in not raising that point, because, in my opinion, this Court has jurisdiction. But it is plain that the Court of Appeal ought not to review the discretion of the judge who heard the case and saw the witnesses, and who must necessarily have a knowledge of the facts and of the inferences to be properly drawn from them greater than

(1) 10 P. D. 179, at p. 182.

the Court of Appeal can have, unless the Court of Appeal can see plainly that the discretion which has been exercised by the judge who tried the case has been exercised on principles not consistent with the spirit of the enactment conferring the discretion, or with the principles recognised by reported decisions as governing the exercise of discretion in the matter of variation of marriage settlements after a decree absolute for divorce.

Now, for the purpose of my judgment, I shall take the facts of this case from the statement of facts in the judgment of Sir F. Jeune on the hearing of the divorce petition, subject, however, to the addition of certain facts which I will presently mention. [The Lord Justice then read the statement of facts from the report of the judgment of Sir F. Jeune, and after adding that the adulteries charged against and admitted by the husband were not only adulteries committed by him at dates prior to the commencement of the suit, but were also adulteries actually continued after the commencement of the suit, continued:—]

The learned President then proceeds thus: "From the facts proved in the case I draw the following conclusions: (1.) That when the wife left the husband in 1897 she did so because she had transferred her affections to the co-respondent, and the petitioner believed this at the time. (2.) That the husband's misconduct did not cause or conduce to that of the wife, inasmuch as, without inferring any act of adultery on her part before the bigamous marriage with the co-respondent, as no such adultery was either directly proved or charged, there can, I think, be no doubt that, at least when she went to Dakota in February, 1901, and probably before, she was contemplating an American divorce from her husband, and, consequently, a marriage to and adultery with the co-respondent. (3.) That the wife's conduct in leaving her husband, in order, after an interval, to commit adultery with the co-respondent, may, in the sequence of events, have caused or conduced to the adultery of the husband: how far it did so I shall presently consider." Besides these facts I shall take into consideration the following: First, that the divorce decree has not been appealed against; whence one may draw, I think, the inference that the respondent

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has accepted the conclusion in fact of the learned judge that her conduct in leaving her husband in order, after an interval, to commit adultery with the co-respondent might, in the sequence of events, have caused or conduced to the adultery of the husband. Secondly, I shall take into consideration that, although the learned judge cannot have supposed that any conduct of the petitioner had been proved at the trial inconsistent with the palliation of his adultery by the desertion of his wife, yet there is no evidence that the petitioner had, at the time of his adulteries after the judicial separation in 1899, any knowledge of any facts likely to have led him to yield to temptation and commit adulteries with a common woman, adulteries continuing after the commencement of the action, he giving no explanation leading to the conclusion that at that time he had abandoned, or that he has abandoned even now, this connection. This seems to me to have been an outrage on common decency. There is, in other words, nothing which one can take into consideration in palliation of the petitioner's adultery other than the mere fact that the respondent had left England and gone abroad to a remote town in a remote State of the United States. There is no evidence whatever of any personal association of the respondent and co-respondent after the judicial separation in 1899 and before the husband's adulteries. There is also the fact that the petitioner avoided cross-examination as to the general charges of adultery, and also avoided giving the sort of explanation which, if the King's Proctor had intervened during the progress of the trial or after the granting of the decree nisi, he would have had to furnish when, by giving no evidence in disproof of his adultery, he would be relieved by s. 3 of the Evidence Further Amendment Act, 1869, from liability to answer questions tending to shew that he had been guilty of adultery.

I will now deal with the principles which, in my opinion, ought to govern the exercise of the statutory power of varying marriage settlements in cases of divorce. First of all, it is to be remembered that in the exercise of the powers conferred by the Divorce Acts the Court must have regard not only to the rights and liabilities of the matrimonial person wronged and of the wrong-doer respectively inter se, but also to the interests of society and public morality, which generally require that the relief and benefits the Courts have the power of giving under those Acts shall scarcely be given to those who themselves have been guilty of matrimonial infidelity. There may be such palliation of matrimonial infidelity by a petitioner as that public morality will not be outraged by the exercise of judicial discretion in favour of such a petitioner. This is, I think, established by the case of *Symons* v. *Symons* (1), which is quoted by the learned President in his divorce judgment; but the fact that the petitioner has been so guilty must always be taken into consideration in the interests of public morality.

Dealing with these principles, I find, first of all, in *Chetwynd* v. *Chetwynd* (2), the following passage in the judgment of Lord Penzance: "In exercising the discretion accorded to the Court under the 22 & 23 Vict. c. 61, s. 5, I have felt bound to bear in mind the conduct of the two parties, as well as their pecuniary position. In s. 32 of the original Divorce Act, by which power was given to make provision for the wife in case of divorce, the Court is expressly told to consider 'the wife's fortune, the ability of the husband, and the conduct of the parties.' And although these words are not repeated in the subsequent Act, 22 & 23 Vict. c. 61, s. 5, they serve to exhibit the spirit of the Legislature in these provisions, and form a fitting guide for the Court. In the endeavour to adjust the means to be accorded to the petitioner, and the burden to be borne by the respondent, several conditions must be borne in mind. It was well not to forget that, though the break-up of the married life was caused immediately by the conduct of the respondent, its stability had been undermined by the withdrawal of the petitioner's affections. It was a subject of fair comment that, but for the extravagance of the petitioner, and the conduct which made her the object of her husband's not unreasonable suspicions, the common fund would have been more ample. Nor ought the fact to have been lost sight of, sworn to by the respondent, that the sum of 1000*l*. had been received since the marriage by the petitioner, the benefit of

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(1) [1897] P. 167.

(2) L. R. 1 P. & M. 39, 44.

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which is now hers if she has not already spent it. The future of the respondent had also to be considered, and the available means which would be left him to sustain his position in his home. If the reasonable needs of the wife did not demand it, the Court could hardly feel justified in so reducing his income as to render his future residence on his property impossible."

Then there is the case of *March* v. *March* (1), in which the same learned judge, speaking of clause 5, says this: "The Court will look at the probable pecuniary position which the parties and their children would have occupied if the marriage which the settlement contemplated had been a binding union, and the parties had lived in harmony together upon their joint incomes. If this union has been broken and the common home has been abandoned by the criminality of one without fault in the other, it seems just that the innocent party should not, in addition to the grievous wrong done by the breach of the marriage vow, be wholly deprived of means, to the scale of which he may have learnt to accommodate his mode of life; nor, viewing the matter on the other side, does it seem either just or equitable that funds which were intended at the time of the marriage for the use of both should be borne off by the guilty party, and perhaps transferred to the hands of the adulterer as the dowry of her second marriage. The interests of society point in the same direction. It would be an evil example if this Court were to decide that the entire fortune of a wealthy married woman was to be reckoned as part of the prospects of an adulterer, or the resources of a second home for a guilty woman." Then later on in the same judgment Lord Penzance says: "This"—that is, the annual sum he has just awarded to the husband, the petitioner, during the joint lives of himself and the respondent—"will not effect an exact division of their joint incomes, nor is it so designed. The relative sums contributed by each party, the conduct of each, the total amounts of their joint income, the relation it bears to the requirements of the parties, and their respective prospects of increased income, are all elements to be considered. These elements are not capable of exact expression in figures, and the result must be a general one, varying according to the details of each case." Then when that case went on appeal to the full Court, Mellor J., who was a member of that Court, quotes with approval from the judgment of Lord Penzance this passage, which is part of the passage I have just read: "If this union has been broken, and the common home abandoned by the criminality of one without fault in the other, it seems just that the innocent party should not, in addition to the grievous wrong done by the breach of the marriage vow, be wholly deprived of means to the scale of which he may have learnt to accommodate his mode of life." Then Mellor J. proceeds: "That I consider to be a sound exposition, and it is my view, of the intention of the statute."

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(1) L. R. 1 P. & M. 440, 442.

It seems to me that the passages which I have quoted lay down the proposition that the sum to be awarded to the injured husband by variation of the settlements must be measured by what is necessary to give him means to the scale of which he may have learnt to accommodate his mode of life; and I cannot myself find in those passages that this measure may be disregarded for the purpose of preventing the co-respondent from making any pecuniary profit out of his own iniquity, and certainly not in a case where the petitioner himself has been guilty of shameless adultery. I do not say that the fact that the guilty wife and the co-respondent have now married and will jointly enjoy such income as the wife retains under her marriage settlement after variation is not to be taken into consideration. But it is obvious that this consideration is not to be carried to the extent of depriving the guilty wife of everything beyond the bare necessities of life in the condition in which she had been brought up. The desire to prevent the co-respondent profiting by his iniquity may justify the turning of the scale in favour of a liberal allowance to the husband to enable him to live with the surroundings that he would have had in the joint home, or may justify the turning of the scale against the wife; but I cannot think it should do more. In the present case, in my judgment, so far as the rights of the parties inter se are concerned, 1000*l.* a year is the outside which should have been allowed as income to the husband;

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and I do not think that the interests of public morality would justify the giving of a larger sum to a husband, himself guilty of adultery, on the ground that the more he gets the less benefit will the co-respondent derive from his iniquity.

Now, I have gone through so much of the judgment of the learned President as refers to what I may call the first 1000*l.*, because I thought that, whatever might be the ultimate conclusion of this Court with regard to this appeal, it was right and proper that I should express my opinion as to that part of the judgment of the President to which I have just now referred; but in fact it is not necessary, in the view that I take, that I should consider in any way the quantum of allowance to the husband, or how it has been arrived at; because, in my opinion, the governing principle is that which I referred to at the commencement of my judgment, namely, that the Legislature deliberately acting, as it appears to me, in accordance with the best feelings of the English people, has shewn from first to last an intention not to deal, to the exclusion of the interests of public morality, either with the question of divorce itself or with any of those subsidiary questions which might arise as between the husband and wife upon the basis of the rights and wrongs of the husband. I have already acquiesced in the correctness of the view of Sir F. Jeune that there may be circumstances in which the relief and benefits which the Court has power under these Acts of Parliament to confer may be conferred upon even a guilty party without outraging in any way public decency or public morality, and I refer to the case of *Symons* v. *Symons* (1) which I have already mentioned; but those cases must be very rare. I cannot myself see in the present case that the benefits intended to be conferred by the Legislature on husbands or wives, or, as in the present case, on the husband who has been wronged, can, having regard to his own conduct, be conferred upon him without seriously trenching upon the spirit of public morality which seems to me to run through these Acts of Parliament. It is remarkable that when Sir F. Jeune is giving his judgment in the divorce case, although he speaks of the

(1) [1897] P. 167.

adulteries, the dates of which appear in the particulars, he nowhere alludes to that which I consider is, from the point of view of public decency and morality, of the highest importance: I mean that actually at the moment and after the moment when the husband came into Court to ask for relief on the ground of the infidelity of his wife, he himself was continuing to indulge in a connection which was an outrage, as I have said, on public decency; and therefore the view that I take is that the report of the learned registrar was right and ought to have been acted upon and affirmed. That report concludes thus: "Having regard to the verdict of the jury of adultery against the petitioner, to there being no issue of the marriage, and to no necessity being shewn for providing for the petitioner out of the wife's trust funds, it is submitted that no order should be made as to variation of the respondent's settlement of October 23, 1889." I think that conclusion is right.

It will be observed that in the earlier part of the report the registrar, who had heard counsel on behalf of the petitioner and respondent, submitted that the Court should with consent order that from and after the date of such order all the interests and powers of the respondent under the petitioner's settlement should be extinguished as if the respondent had died in the lifetime of the petitioner, and that the trustees of that settlement should reconvey the property comprised therein to the petitioner. That property has accordingly been, by consent, ordered by Sir F. Jeune's order to be restored to the petitioner. That part of the order of course stands; but I think the learned registrar was quite right in mentioning not only the misconduct of the husband, but also the fact that what his report proposed to refuse to give to the petitioner was not anything that was essential to his support in the condition of life in which he is, but was something that was asked for for the purpose of restoring to him the luxuries of life which he had enjoyed during the continuance of the marriage.

Now, I really do not know that it is necessary for me to say much more, because, if my conclusion is right up to this point, no question can possibly arise as to the second 1000*l.* which was directed to be paid by the trustees of the respondent's settlement to the petitioner after property should have come to the respondent by reason of the death of her mother, because it is plain that, if my conclusion has been right as to the first 1000*l.*, it must also be right as to the second. But I wish to say that even if my conclusion as to the first 1000*l.* had been that it was a sum which could properly be given to the petitioner, and I had so far supported the order, I should have come to the conclusion that the second 1000*l.* ought not to have been given to the petitioner. I should have come to that conclusion by reason of the principle laid down in *Chetwynd* v. *Chetwynd* (1) and *March* v. *March* (2), because, as I have already said, in my opinion there is nothing in the judgments in either of these cases which does away with the principle that the means essential to the continuation of the scale of living enjoyed by the husband during the continuance of the joint home should be primâ facie a measure of the allowance of income which ought to be made to him: I am, of course, leaving out of consideration here the case of children.

With regard to the last part of the order, that is the order by which the 500*l.* a year was to be paid for four years in order to recoup the husband, in my opinion that part of the order cannot be justified, because, in substance, it would be to treat the powers under s. 5 as powers justifying a retrospective order. The only observation which I will make on this last point by way of precaution is that where a guilty wife has put her husband to considerable expenditure by reason of her personal conduct, in considering the amount to be allowed to the husband by variation of settlements one must take into consideration the existence of liabilities and the large expenditure of money that may be caused before the time arrives at which the injured party will get the benefit of the variation. In such a case it may be necessary to add something to the income either temporarily or permanently so as to enable him to meet those liabilities.

I think that this appeal should be allowed, and that an order should be made in the sense of the report of the learned registrar.

(1) L. R. 1 P. & M. 39.

(2) L. R. 1 P. & M. 440.

STIRLING L.J. In this case the Court is asked to exercise a delicate jurisdiction in novel and difficult circumstances, and to review the decision of a learned judge who had large knowledge and experience in the exercise of that jurisdiction. I approach the case without any such knowledge or experience, but I have endeavoured to do my best to consider what conclusion the Court ought to arrive at, and I think it is right, as we are differing from the late President of the Court, to state, as shortly as may be, the ground for the conclusions at which I arrive.

Now I begin by observing that under the Matrimonial Causes Acts there exists no power in the Court to award anything in the shape of damages as between husband and wife, although powers are vested in the Court to award damages against a co-respondent. Further, there is no power to inflict anything in the nature of a fine or penalty upon a person guilty of a matrimonial offence. The powers which the Court possesses are conferred by two enactments, one by s. 45 of the Act of 1857, which provides as follows: [The Lord Justice read the section, and continued:—] The second power conferred upon the Court is that contained in s. 5 of the Act of 1859, which provides as follows: [The Lord Justice read that section, and continued:—]

In the present case the petition on which the order under appeal was founded was in terms an application to the Court to exercise the power conferred by the latter of these enactments; but it seems to me that, in the exercise of that jurisdiction, the Court might also have seen fit—and at most it would only have required an amendment of the petition if that had been the view of the Court—to bring into operation the jurisdiction contained in s. 45 of the Act of 1857. I say this in view of what I shall have to make hereafter a few remarks upon with regard to the property which belongs to the wife beyond that contained in the ante-nuptial and post-nuptial settlements which it is sought to vary. Now, the jurisdiction was conferred in the year 1859, and the principles on which the very wide discretion conferred on the Court by s. 5 of the Act of 1859 should be exercised have been repeatedly considered. I think the best exposition of those principles is to be found in the case which has already been referred to by my Lord of *March* v. *March* (1), which was not only a carefully considered decision of Lord Penzance, sitting as Judge Ordinary, but was a decision affirmed, on appeal, by the full Court. I do not read again those portions of the judgment which have been already referred to, but I desire to state that I wish most fully to give effect to everything which was there laid down. It appears to me that at this distance of time it would not be right to reconsider the judgments delivered in that case; without saying that they are exhaustive, it seems to me they constitute a sufficient exposition of the principles applicable to the present case, and from those principles I do not desire to depart. It is largely on that case that the learned President founds his decision here. He refers to that case and to a subsequent case of *Noel* v. *Noel* (2) as the authorities on which he bases his statement of the law, and I do not think he meant in any way to depart from what is there laid down; but with the utmost respect to him it appears to me that, at all events in one particular, the language he has used on this subject has gone beyond what is warranted by those cases, and may possibly give rise to misconception. I refer to that portion of the judgment in which he lays down as a broad principle that the co-respondent is not to be allowed to make any pecuniary profit out of his own iniquity. Though I entirely recognise the necessity, as is pointed out in the judgment, that full regard should be had to public morality, yet I think the expression of the learned President might be misinterpreted as conferring a much wider jurisdiction than I conceive to be conferred by the Legislature; and I should prefer myself to state the law in this way—that in the exercise of every discretion which is vested in the Court, the Court should endeavour to promote virtue and morality and to discourage vice and immorality.

Having made these preliminary observations, I pass on to consider more particularly the matters to which the Court

(1) L. R. 1 P. & M. 440.

(2) 10 P. D. 179.

is to have regard, according to the decisions, in exercising this principle. They are shortly stated by Lord Penzance thus: "The relative sums contributed by each party, the conduct of each, the total amount of their joint income, the relation it bears to the requirements of the parties, and their respective prospects of increased income, are all elements to be considered. These elements are not capable of exact expression in figures, and the result must be a general one, varying according to the details of each case."

That being so, let me consider shortly each of those necessary elements in the present case. Now, as regards the first, "the relative sums contributed by each party," the figures stand thus. By the wife, there has been brought into settlement a sum of 51,000*l.*, yielding 2200*l.* per annum: by the husband, a sum of 10,000*l.*, yielding between 300*l.* and 400*l.* per annum; and I may state here conveniently that the husband was entitled in possession to the income of another 10,000*l.*, which, together with other property of which he was possessed or had been settled on his behalf, brought up his income to 710*l.* a year. The total amount, therefore, of the joint income approximates closely to 3000*l.*: it falls somewhat short of it. Passing by, for the moment, the conduct of the parties, there has to be considered "the relation which it" (the joint income) "bears to the requirements of the parties." Now, in this case it must be remembered that there are no children of the marriage, so that one important element has not to be considered here. The husband, it appears, gave up business before he married, and it has been stated that he has not resumed business.

Then we come to consider "the conduct of each party." Now, that is a matter which has given me the greatest anxiety. I begin with that of the wife, which is the simpler case of the two. The short facts are these. The wife has ever since the year 1896, the marriage having taken place in 1889, withdrawn her affections from her husband and bestowed them upon the co-respondent. From January, 1897, she has ceased to live with her husband, who in 1899 obtained a decree of judicial separation on the ground of desertion. From 1901 she was actually engaged in the endeavour to obtain a divorce in a distant country, with a view of marrying the co-respondent, and in this she ultimately succeeded, although neither the divorce nor the marriage can be recognised by the law of this country. For all this course of conduct I see no palliation or excuse whatsoever, and it seems to me impossible for the Court to arrive at any conclusion other than this, that she has been guilty of a great matrimonial offence.

As regards the husband, he, having availed himself of his legal right to a judicial separation, proceeded in 1902 to bring an action for dissolution of his marriage, founded on the marriage and cohabitation of his wife with the co-respondent. But previously to this, in August and September, 1901, and subsequently in September and November, 1902, during the pendency of the action, he was guilty of what the learned President stigmatised in his judgment as "shameless adultery." No explanation has been given of the circumstances in which this offence was committed. The petitioner did not go into the box to explain his conduct or to express regret at his having been guilty of this flagrant violation of morality, and the only excuse for it which the circumstances disclose is his wife's desertion. Notwithstanding this, the learned President exercised his discretion in favour of the husband and dissolved the marriage at his instance, and from that there was an appeal in the first instance, but it was afterwards abandoned. I cannot think, however, that this exonerates the Court on the present application from taking into consideration the conduct of the husband.

Lastly, there are to be considered the "respective prospects of increased income." Now, so far as appears, the husband has no such prospects. On the other hand, the wife will, if she survives her mother, succeed, under the will of her father, to what is commonly termed a protected life interest in a capital sum of 150,000*l.* or thereabouts. By "a protected life interest" I mean an interest which is to cease in certain events, and one of these is, if the wife "shall do or suffer any act or thing or any event shall happen whereby, if the said income were made payable to her for life, she would be deprived of the right personally to receive and enjoy the same or any part thereof, or some other person might become entitled to receive the said income or part thereof." That protected life interest is not the subject of an "ante-nuptial or post-nuptial settlement" within the meaning of s. 5 of the Act of 1859. If the wife's interest had been absolute, it might have been dealt with under s. 45 of the Act of 1857; but it is obvious from the terms of the gift that any order which the Court might make directly affecting that life interest would be futile, inasmuch as it would produce a cessation of the life interest according to the terms of the will. Now, by the order appealed from the learned President has thought fit to order that "the said trustees do, as from the date of this order, during the joint lives of the petitioner, the respondent and her mother, pay to the petitioner, out of the income of the funds for the time being subject to the said settlement the annual sum of 1000*l.*, and from and after the death of the mother do thenceforth, during the remainder of the life of the petitioner, pay to him out of the said income, in lieu of the said annual sum of 1000*l.*, the annual sum of 2000*l.*, and do further pay to the petitioner out of the said income the capital sum of 2000*l.*, the said sum to be paid by equal annual instalments of 500*l.*, if and so long as the said income, after payment of the said costs and any other annual sum for the time being payable under this order, will extend to the payment of annual instalments of that amount." So that for the first four years he directs the payment of 1500*l.* per annum, and during the rest of the time, until the death of the mother, an annual payment of 1000*l.*, and after that event the sum of 2000*l.*

Now, the wife's life interest under the will, as I have said, is not one which is effectively under the control of the Court. It certainly is not one which can be dealt with under s. 5 of the Act of 1859. It is only a matter which the Court can take into consideration in making an order for variation of the settlements.

The learned President and the learned counsel for the petitioner, the husband, have, in support of the order so far as it relates to the additional sum of 1000*l.* which is to be paid after the death of the mother, relied on the case of *Noel* v. *Noel* (1); but in that case the marriage had been dissolved at the suit of the husband, and by the marriage settlement the wife had a certain interest in the husband's property and had settled her own property, including certain reversionary property which was stated to be of great value. In that case the question arose as to what was to be done with the income of the reversionary property, which, be it observed, was the subject-matter of the settlement when it fell into possession; and the then President, Sir J. Hannen, says this: "With regard to the wife's reversionary interest, I am of opinion that half of that income when it falls in must be paid to the husband on this principle: when a woman by her own fault has broken up a family of which she was a part, the Court must endeavour to put the husband and the children, as far as money goes, in the same position as they would have been if she had not broken it up." With that principle and with the application of it made in that case I entirely agree; but, be it observed, that case is very different from the present. In the first place, the fund was one which was the subject of the settlement, and therefore the learned President had full power to deal with it directly. In the second place, there were children in existence, and where there are children of the marriage who will succeed to property comprised in the settlement, it is of high importance that they should be brought up in accordance with the fortunes to which they will succeed, and the Court would exercise the discretion vested in it by the statute in such a way as to secure this. Lastly, in that case the husband was entirely innocent, and had been guilty of no matrimonial offence.

Now, as regards this part of the present case, it is clear, when one reads the judgment of the learned President, that, in the first instance, he was under a misapprehension. He thought that he had power, or at all events he forgot for the moment that he had no power, to deal with this reversionary interest directly. But when the terms of the father's will were called to his attention he saw that the order which he clearly expresses himself as about to make would be futile, and consequently he made the order in the form in which it now stands.

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(1) 10 P. D. 179.

I am unable to agree with the view that was taken by the learned President. I am not satisfied, in the first place, that he really exercised his discretion upon a full consideration of the facts. In the second place, I think that he went beyond the law laid down in the case to which I have referred, *March* v. *March* (1), and that he omitted to take into consideration to a sufficient extent the conduct of the petitioner. In the third place, I think he more than repaired the loss which had been occasioned to the petitioner, even if an innocent person, according to the standard which is laid down in *March* v. *March* (1), namely, that he is not to be "wholly deprived of means to the scale of which he may have learnt to accommodate his mode of life."

As regards the four sums of 500*l.* each which under the order are payable during the first four years, these were sums directed to be paid because the wife appeared during the period of her desertion of her husband to have received them as income coming from the husband's fund. The wife was quite willing, as a term of settlement, that the future income of the husband's fund should be paid to him; but in exercising the statutory jurisdiction the learned President had no power to give it a retrospective action, and it seems to me that by the order which he made he was, in effect, giving it retrospective operation. On this point I am unable to agree with the learned President.

I have felt more difficulty as regards the sum of 1000*l.* which the learned President directed to be paid in the first instance. I feel very strongly that the conduct of the petitioner does not entitle him to any great consideration from the Court; but the learned President, notwithstanding the nature of that conduct, saw fit to dissolve the marriage and to exercise the discretion which the Act gave him. I have hesitated as to whether the sum which the learned President first awarded ought to be departed from; but as my learned brethren both take a strong view, with which I sympathise, against the petitioner and

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(1) L. R. 1 P. & M. 440.

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think it was not right that he should be allowed anything out of that fund, I am not prepared to differ from them, and I, therefore, agree with the order which they propose to make.

COZENS-HARDY L.J. It would not be right for me to occupy the Court more than a few minutes, inasmuch as I entirely assent to the elaborate judgments which have been delivered by my Lord and Stirling L.J.; but I desire very briefly to state the reasons which have influenced me.

It is settled by authority which binds us, and I think I should have come to the same conclusion apart from authority, that in exercising the jurisdiction conferred upon the Court of varying settlements, the conduct, not of one party but of both parties, must be had regard to, and that we must also not forget considerations of public morality and public decency.

Now it was strenuously argued before us by Mr. Lawson Walton and Mr. Priestley that the judgment of the late President in the divorce case has concluded that matter; that the husband must be regarded as completely whitewashed, as in fact innocent, and that it is not now open to us, in exercising the discretion conferred on us by the section, to treat the husband as a man who has been guilty of any matrimonial offence, or as a man whose conduct is deserving in any way of reprobation. I am unable to assent to that view. I think it is within the power of the Court, and, if it is within the power of the Court, it is part of the duty of the Court, to consider all the circumstances of this case affecting both the husband and the wife. Without pretending to weigh in the balance minutely the faults of the husband and of the wife, I do not feel myself able to say that the conduct of the husband was not more outrageous and not more subversive of public decency than that of the wife.

I wish to refer to a matter which I think was somewhat overlooked by the learned President, and that is the conduct of the petitioner himself subsequently to the presentation of the petition. Now, the petition is dated July 3, 1902. The acts of adultery prior to that date I say nothing about, but the acts of adultery alleged by the respondent in her answer filed on

December 18, 1902—acts alleged and admitted—took place on September 13, 18, 21, 24, and 29, 1902, and November 3, 14, 15, and 20, 1902. So that these nine acts of adultery were committed in 1902 (not in 1901, as stated by mistake in the report of the trial), all subsequently to the presentation of the petition. I think it is not exaggerating to say that the acts of adultery alleged and admitted took place up to or on the very eve of the answer of the respondent to the petition. But the case does not stop there, for not only did the husband come shamelessly into Court asking to be relieved in respect of his wife's adultery when he was himself continuing, after the presentation of the petition and almost up to the trial, to commit adultery, but he studiously and persistently, on the hearing of his petition, evaded any liability to cross-examination as to his past relations, and it may be as to his present relations, with the person whom Sir F. Jeune has described as a "professional seductress."

All I can say is, I decline to exercise my judicial discretion in favour of a petitioner whose conduct has been such as I have described. It seems to me that the registrar's report was perfectly right, and that we should not in the exercise of our discretion be justified in giving a petitioner guilty of conduct such as I have described any part of the property brought by the wife into settlement. In my view, the order ought to be as reported by the registrar, and the order of the learned President ought to be set aside.

Appeal allowed.

Solicitors: *Lewis & Lewis; Hollams, Sons, Coward & Hawksley; Freshfields.*

Solicitors for a person interested: *Griffith, Davie & Smith, Brighton.*

G. I. F. C.

[IN THE CONSISTORY COURT OF LONDON.]

1905
July 10.

In re ST. MARGARET'S, WESTMINSTER.

Ecclesiastical Law—Faculty—Enlargement of Chancel of Parish Church—Re-erection of Chancel East Wall containing historical painted Window presented by House of Commons—Consents required to removal and new position of Military Colours affixed to Chancel Walls under Faculty—Evidence of Assent of House of Commons to Application for Faculty.

A faculty for the enlargement of the parish church of St. Margaret's, Westminster, by taking down and rebuilding the east wall of the chancel of the church six or seven feet further to the east and for other alterations in the church, including the re-erection and releading of the historical painted window at the east end of the chancel erected by the House of Commons, was granted, on the application of the rector and churchwardens with the consent of the parish vestry, on it appearing in evidence that official notice of the application for the faculty had been given to the then Speaker of the House of Commons, and that the assent of the members of the House of Commons to the works proposed by the faculty had been sufficiently shewn.

The temporary removal of certain military colours affixed to the walls of the chancel under a previous faculty (see *Vincent and Tomlinson* v. *Eyton*, [1897] P. 1) was authorized by the Court with the consent of the representative of the regiment to which the colours belonged.

THIS was a cause of faculty instituted on behalf of the Rev. Canon Herbert Hensley-Henson, rector of the parish of St. Margaret's, Westminster, and Vice-Admiral Ernest Neville Rolfe and Mr. Edwin Horatio Fedarb, churchwardens of the parish, for the purpose of obtaining a faculty authorizing the following alterations to be made and works to be done in this church, shewn on a plan filed in the registry and described in the petition in the suit as follows:—

To take down the east wall and re-erect the same about six feet to the east, thereby lengthening the chancel by about six feet.

To take out the east window (1), relead the glass in the east window, and replace it on the east wall about four feet higher than at present.

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(1) As to this window, see *Vincent and Tomlinson* v. *Eyton*, [1897] P. 3, n. (1).

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To panel the lower part of the east wall and return walls north and south in oak.

To remove the existing reredos, excepting the central panel in relief, and to re-erect a new reredos embodying therein the said central panel.

To remove the banners as now situate and to replace them in suitable positions.

To remove the two existing circular-fronted steps leading to the Communion Table, and substitute for the same straight steps across the chancel from the north wall to the south wall.

To raise the Communion Table one step.

The cause was now heard before the Chancellor of the Diocese of London (Dr. Tristram, K.C.).

The faculty was moved for by the solicitor for the petitioners, all of whom were called as witnesses. The result of their evidence, so far as it is material, appears from the judgment.

No appearance was entered for any opponent.

Dr. Tristram. This is an application to the Court to grant a faculty authorizing certain alterations, described in the petition and shewn on the plans before the Court, which are proposed to be made at the east end of the parish church of St. Margaret's, Westminster. The rector of the parish in his evidence has explained the plans, and the Court is of opinion that the proposed alterations will be a great improvement to the church. The scheme has been laid before the parish vestry at a meeting especially convened for the consideration of the subject, when a unanimous resolution of the vestry was passed approving of it. But in this particular case the Court would not have been prepared to grant the faculty had it not received also the approval of the representatives of the House of Commons. The church of St. Margaret's, Westminster, has ever since the year 1614 been the church of the House of Commons, and in the Journals of the House for 1735 it is described as "the National Church for the use of the House of Commons." There have been several improvements carried out in the church since that time towards which the House has appropriated liberal sums. In 1758 the House erected the present east window at the cost of

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Dr. Tristram.

the nation, and as late as about the year 1880 it voted a sum of 1500*l.* towards improvements, which were approved of by the Court, at the time when Archdeacon Farrar was rector of the parish. It appears by the evidence that the plans of the present scheme were, after official notice given of this application, submitted to the late Speaker before his resignation, and submitted by him to Sir Michael Hicks Beach, the Father of the House of Commons, to Mr. Asquith as representing the Opposition, and to Mr. Lyttelton as representing His Majesty's Government, all of whom have expressed their approval of the proposed scheme. There is one other consent which the Court required, and that was the consent of the Colonel in command of the Queen's Westminster Volunteers in respect of the removal and replacing of their colours. The colours were placed in their present position projecting from the present east wall of the church under a faculty granted by this Court in 1897. (1) These colours had originally been placed in the chancel of St. Margaret's Church at the time when a regiment of volunteers, now represented by the Queen's Westminster Volunteers, had been disbanded shortly after the termination of the war with France in the early part of the last century. Owing to their having been removed without a faculty by a former rector to another part of the church the Court, on the application of Sir Howard Vincent, the then Colonel of the Queen's Westminster Volunteers, granted a faculty for the restoration of the colours to their original place in the chancel. It is proposed to temporarily remove them, and when the proposed alterations are finished to replace them in the chancel. It may be, however, perhaps necessary when they are replaced to make a slight alteration in their position, but they would still be retained in the chancel, and as near as practicable would be in a corresponding position to that which they now occupy. Before it would authorize the removal and replacing of these colours the Court must have had the consent of Colonel Trollope, the present Colonel of the Queen's Westminster Volunteers. His consent having been given, the Court will insert in the faculty a clause authorizing the colours to be placed on a site, to be agreed on

(1) See *Vincent and Tomlinson* v. *Eyton*, [1897] P. 1.

by the rector of the parish and Colonel Trollope, as near as practicable to their present site. A piece of ground lying between the present east wall of the church and the railings of the adjacent pavement, and for which 50*l*. has been paid, has been granted by the Crown to the rector for the use of the parish for the purpose of extending the chancel seven feet to the eastward; and as this piece of land has never been consecrated, and when the alterations are completed will be the site of a portion of the east end of the church, the Bishop of London has intimated that he will consent to consecrate it. The Court will decree the faculty to issue as prayed.

Solicitors for petitioners: *Fowler & Co.*

C. F. J.

THE ASSAYE.

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April 16, 18, 19; *May* 2; *July* 14; *Dec.* 10.

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July 7, 8, 14.

Admiralty—Damage—Collision in the Solent—Narrow Channel—Regulations for Preventing Collisions at Sea, 1897, *art.* 25—*Compulsory Pilotage—Trinity House Outport District—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *ss.* 605, 622.

The waterway known as the Solent constitutes a narrow channel within the meaning of art. 25 of the Regulations for Preventing Collisions at Sea, and, therefore, every steam vessel must, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel.

Under the statutory jurisdiction exercised by the Trinity House of Deptford Strond since 1808 in respect of outport districts, the waterway between the sea and Southampton, by way of the Solent, has always constituted, for the purposes of compulsory pilotage, one district only, although for the convenient examination and control of the pilots licensed by the Trinity House, that corporation, as the pilotage authority, has from time to time divided the district amongst sub-commissioners at Portsmouth, Cowes, and Southampton, and although the limits of the licences of the pilots in respect of the district have been varied, and exclusive rights given to Southampton pilots in respect of the pilotage of inward-bound vessels when arriving at the seaward end of Southampton Water.

Action of damage by collision.

The plaintiffs were the owners of the *New York*; the defendants, and counter-claimants, were the owners of the *Assaye*.

The case is reported on two points only—namely, (1.) on the question of the waters of the Solent being a narrow channel, and (2.) on the question of compulsory pilotage in those waters.

The facts were shortly as follows:—

On March 20, 1904, about 1.30 P.M.—the weather being hazy, with a moderate south-westerly breeze, and the tide ebb running about four knots—the *New York*, a twin-screw steamship of 10,799 tons gross register, from New York to Southampton viâ Plymouth and Cherbourg, with cargo and passengers, in charge of a duly licensed Trinity House Isle of Wight pilot, was proceeding up the Solent heading about E.N.E. magnetic at a speed of about eleven and a half knots through the water, when she saw, manœuvred for, but came into collision, off Sconce Point, with the *Assaye*, a twin-screw steamship of 7377 tons gross register, belonging to the Peninsular and Oriental Steam Navigation Company, from Southampton to Queenstown and Bombay with cargo, passengers, and troops, in charge of a duly licensed Trinity House Southampton pilot, and, shortly before the collision, proceeding on a W. ½ S. magnetic course at a speed of about twelve knots.

Both vessels sustained considerable damage, and, on March 21, the plaintiffs, the owners of the *New York*, issued a writ against the owners of the *Assaye*, and on April 7 delivered their statement of claim. On April 11 the defendants, the owners of the *Assaye*, delivered their defence and counter-claim, each side charging the other with breaches of the Regulations for Preventing Collisions at Sea, and both the plaintiffs and the defendants pleading, alternatively, that if the collision was caused or contributed to by the negligence of any one on board their steamship (which was denied) the same was solely the negligence of a duly qualified pilot who was in charge of the vessel at the time and place by compulsion of law.

On April 16, 18, and 19, the case was heard by the late President (Sir F. H. Jeune), sitting with two of the Elder Brethren of the Trinity House, and, in the course of his judg-

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ment, on May 2, when considering the position and manœuvres of the two vessels at the material time prior to the collision, said: "I have no doubt that this part of the sea is a place in which art. 25 of the Regulations for Preventing Collisions at Sea (1) applies, that is to say, it is a narrow channel, and the rule applies to each vessel directing each to keep on its proper side." The learned judge then found that both the *New York* and the *Assaye* were to blame, under that article, for being out of their proper water; but that the fault rested alone on the respective pilots of the two vessels, and the learned judge reserved the question whether pilotage was compulsory for either or both vessels so as to absolve the owners from liability.

On July 14 the case came before Sir F. H. Jeune on the question of compulsory pilotage, when it was practically admitted, on behalf of the plaintiffs, the owners of the *New York*, that the *Assaye* was under compulsory pilotage; but the presence of two of the Elder Brethren of the Trinity House assisting the judge was objected to by counsel for the defendants, the owners of the *Assaye*, on the ground that the argument to be addressed to the Court for the purpose of shewing that the *New York* was not under compulsory pilotage would involve a review of the acts of the corporation of Deptford Strond; but the objection was not pressed, and the hearing was adjourned, being ultimately resumed on December 10, when Mr. Keigwin, chief clerk in the Pilotage Department of the Trinity House, was examined at length, and the records relating to the licensing of pilots at Portsmouth, Cowes, and Southampton were produced and extracts read from the Trinity House minute-books, the *London Gazette*, and pilotage returns, the question turning on the meaning of the word "district" in s. 605 of the Merchant Shipping Act, 1894, the contention, on behalf of the defendants, the owners of the *Assaye*, being that, in the waters of the Solent, there was a pilotage district, called, in the Trinity House records, the Isle of Wight district, to the westward of a line drawn from Lepe Buoy to Lee Point, and for which pilots were licensed; and another district, called the Southampton district, to the eastward of that line to Southampton, and for which other pilots were licensed; and as the *New York* was bound from Cherbourg, her last port of call, to Southampton, and was at the time of the collision within the Isle of Wight district, she was, in the language of s. 605, "passing through a pilotage district in the United Kingdom" (namely, the Isle of Wight district) "on a voyage between two places" (namely, Cherbourg and Southampton), "both situate out of that district," and, therefore, was "exempted from any obligation to employ a pilot within that district."

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(1) Art. 25: "In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel."

The plaintiffs, the owners of the *New York*, met this contention by urging that, under s. 622 of the same statute, pilotage was compulsory within the Trinity House outport districts, of which the whole area from the sea to Southampton, by way of the Solent, was one such district, that the Trinity House had merely divided the old district, over which they had exercised pilotage jurisdiction since 1808, for convenience of administration, into two divisions, and had no statutory power to make new districts, that power being vested in the Board of Trade, the result being that, although the Trinity House had from time to time appointed sub-commissioners at Portsmouth, Cowes, and Southampton, for the examination and control of pilots, and although the Trinity House had, at different times, altered the limits within which different pilots were licensed, there was only one district, which included the whole of the Solent as well as Southampton Water, and, therefore, the *New York* was not "passing through a district" to a place out of that district within the meaning of s. 605 so as to be entitled to exemption.

Owing to the resignation of the President the question of compulsory pilotage was re-argued on July 7 and 8, 1905, before Bargrave Deane J., by—

Pickford, K.C., *Aspinall, K.C.*, and *Walter S. Glynn*, for the plaintiffs, the owners of the *New York*.

Scrutton, K.C., and *Lauriston Batten, K.C.*, for the defendants, the owners of the *Assaye.*

[The material portions of the statutes bearing on the question, together with extracts from the minutes and returns made to Parliament by the Trinity House of Deptford Strond, are set out in the judgment. The following cases were referred to by counsel: *General Steam Navigation Co.* v. *British and Colonial Steam Navigation Co.* (1); *The Charlton* (2); *The Mercedes de Larrinaga.* (3)]

Cur. adv. vult.

July 14. BARGRAVE DEANE J. The question is whether at the time of the collision which occurred between the *New York* and the *Assaye* in the Solent, off Sconce Point, at about 1.30 on March 20 in last year, either or both ships were subject to compulsory pilotage.

The *New York* is a steamship of 10,799 tons gross, and was on a voyage from Cherbourg, in France, to Southampton, in charge of a Trinity House pilot. The *Assaye* is a steamship of 7377 tons gross, and was on a voyage from Southampton to Queenstown, in Ireland. She also was in charge of a Trinity House pilot.

The collision action for damage was tried before the late President some time ago, and he found both vessels to blame, the blame in each case attaching to the pilot in charge of each ship; so that if the pilotage was in either case compulsory, the owners of that ship will escape liability for the damage resulting from the collision.

It is necessary that I should go back some little way into the history of compulsory pilotage so far as it concerns this case. The first Act of Parliament to be dealt with is the Act of 1808 (48 Geo. 3, c. 104). Under s. 20 of that Act the corporation of the Trinity House of Deptford Strond, known as the Trinity House, had power to appoint sub-commissioners to examine and report to the Trinity House as to the capacity of those who

(1) (1869) L. R. 4 Ex. 238.
(2) (1895) 8 Asp. M. L. C. 29.
(3) [1904] P. 215.

sought pilotage licences; but that Act, by s. 77, was only to be in force for four years.

One of the difficulties in this case arises from the use of the word "district" in the various Acts of Parliament. Sect. 20 of the Act of 1808 says that it shall be lawful for the said corporation of Trinity House of Deptford Strond, and they are hereby required to appoint from time to time (as often and for such periods as they, in their discretion, shall think fit), at such ports or places in England as they may think requisite (except within certain other districts which are excepted), proper and competent persons, not to exceed five nor less than three, at each port or place for which any such appointment shall be made, the persons so to be appointed to be called sub-commissioners of pilotage. The words there are "ports or places." In accordance with the powers conferred by that section the authorities of the Trinity House did appoint a certain number of persons, and on January 19, 1809, published in the *London Gazette* the following notice: "Pursuant to the directions of an Act passed in the 48th year of the reign of His present Majesty, intituled 'An Act for the better regulation of pilots and of the pilotage of ships and vessels navigating the British seas,' the corporation of Trinity House of Deptford Strond have appointed and licensed pilots at Portsmouth and Cowes, in the Isle of Wight, for the harbours, channels, and coasts within that district." The word is singular, "district," and, therefore, the original district which was made at that time by the Trinity House authorities was the district of "Portsmouth and Cowes, in the Isle of Wight, and for the harbours, channels, and coasts within that district." Then, in the *Gazette*, they also published the names of the pilots appointed at Portsmouth, and the notice says that they are "licensed to take charge of ships to and from the Owers, eastward, without the Isle of Wight, to Peverell, westward, to and from those limits to all places and ports within the Isle of Wight and in and out of St. Helen's, Spithead, Portsmouth Harbour, Stokes Bay, Motherbank, Southampton Water, Cowes Road and Harbour, Yarmouth, Lymington, the Needles, and Christchurch, and to and from each of these ports and places." So that a district was created known as the Portsmouth and Isle of Wight district, which includes all the ports and harbours, for the purpose of this case, between Peverell, westward, and the Owers Lightship, eastward. I need not trouble to read the specific licences granted to other persons of less jurisdiction than that which I have read. They are appointed for limited pilotage within that one big district.

That was the state of things in 1809, but it is right that I should read the notice, as it refers to Cowes besides Portsmouth. The notice says: "The names of the pilots appointed at Cowes are as follows." Then follow the names of the pilots, and they are "licensed to take charge of ships to and from the Owers, eastward, without the Isle of Wight, to Peverell, westward, to and from those limits to all places and ports within the Isle of Wight and in and out of St. Helen's, Spithead, Portsmouth Harbour, Stokes Bay, Motherbank, Southampton Water, Cowes Road and Harbour, Yarmouth, Lymington, the Needles, and Christchurch, and to and from each of those ports or places." So that a district appears to have been created with two sets of sub-commissioners, who are to examine and issue certificates to pilots for the purpose of their being licensed by the Trinity House within that big district; and it is important to see that although sub-commissioners are appointed at two places, namely, at Portsmouth and at Cowes, the district is one, with two divisions in which the sub-commissioners are appointed only for the examination of fit and competent persons to act as pilots.

The next observation I have to make is this—that at this time, apparently, a book was started by the Trinity House authorities, which has been put in. On p. 5 there are the names of the sub-commissioners appointed for Cowes, and at the top is put "Definition of limits"; that is to say, the limits within which the examination by the sub-commissioners is to be taken, and that is practically in the same words as I have just read from the notice in the *Gazette*. The appointments on p. 5 filling up vacancies go down to September, 1860. It may be important to notice that. Then on pp. 53 and 54 are similar entries under the head of "Portsmouth:

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Definition of limits." The limits are exactly the same as in the Cowes limits. Then there are the names of five gentlemen appointed, as there were at Cowes, and of those appointed subsequently, and the record goes down to May 24, 1866. Those are the last dates on which appointments were made. I shall have to refer to this book later; but apparently there were consecutive appointments to those two places, Cowes and Portsmouth, down to 1860 in the one case and 1866 in the other. Therefore the Trinity House records shew continuous appointments of sub-commissioners at those two places for the purpose of the examination of persons who wished to be licensed as pilots by the Trinity House within the Portsmouth and Isle of Wight district.

In 1812 the Act of 52 Geo. 3, c. 39, by s. 20 re-enacted, in identical words, s. 20 of the original Act which I have just read. Sect. 23 of that Act makes pilotage compulsory within those limits, and s. 32 introduces for the first time the word "districts" into the Act of Parliament. That section says: "Nothing in this Act shall extend or be construed to extend to the taking away, abridging, defeating, impeaching, or interrupting of any grants, liberties, franchises, or privileges heretofore granted by any charters or Acts of Parliament to the pilots of the Trinity House of the town of Kingston-upon-Hull, or the Trinity House of Newcastle-upon-Tyne, or to give any authority to the corporation of the Trinity House of Deptford Strond, within any ports or districts having separate jurisdictions in matters of pilotage." I think, in that particular section, the word "districts" applies, not to the district within which pilotage is made compulsory, or is in operation, but to the districts of those three sets of persons—the Trinity House of the town of Kingston-upon-Hull, the Trinity House of Newcastle-upon-Tyne, and the Trinity House of Deptford Strond. It seems to me that the word "districts" there introduced does not refer to the district into which we are inquiring, but means in that section the district of the pilotage authority—that is to say, the general jurisdiction of those three corporations, and, in this case, the Trinity House, not the port for which sub-commissioners are appointed under the Act.

Then comes the Act of 1825 (6 Geo. 4, c. 125). It repeals and re-enacts portions of the Act 52 Geo. 3. Sect. 5 of the Act repeats, in identical words, s. 20 of the two previous Acts to which I have referred. So things went on down to 1843, and on December 5 of that year apparently the people of Southampton, which was a growing port, thought that it was advisable that their young men should be able to be examined before sub-commissioners at Southampton for the purpose of obtaining pilotage licences. Accordingly a visit was paid to Southampton by a committee of the Trinity House, and a document has been put in with reference to that visit entitled: "Extract from a report of a visit to Portsmouth, Cowes, and Southampton," dated December 5, 1843. The committee proceeded to visit Portsmouth, Cowes, and Southampton on business connected with the pilotage establishments at those ports. "The committee were here (Southampton) waited upon by the Sub-commissioners of Pilotage" (giving the names), "with whom the subject of a separate sub-commission for the port of Southampton was discussed at considerable length." Then the report speaks of the complaints that had been made, and the committee considered that the rare occurrence of complaints was "attributable rather to the inconvenience to which parties having cause for dissatisfaction are at present subject from the absence of all proximate authority, than to the uniform good conduct of the pilots." The report concluded: "Your committee are induced to recommend to the Court"—that is, the Court of the Trinity House—"that a sub-commission of pilotage should be established at Southampton, and such regulations framed for the conduct of the service thereat as may be deemed necessary." Accordingly, on April 23, 1844, there is published in the *London Gazette* by the authority of the Trinity House in London a notice in form similar to that which I have already read as having been published in 1809. It is in these terms: "Pursuant to Act of Parliament, passed in the 48th year of the reign of His late Majesty King George III., intituled 'An Act for the better regulation of pilots, and of the pilotage of ships and vessels navigating the British seas,' the corporation of Trinity House of Deptford Strond, shortly after the passing of the said Act, licensed pilots for Portsmouth, and for Cowes in the Isle of Wight, and the harbours, channels, and coasts within the district called 'the Portsmouth and Cowes district,'"—the word "district" is singular throughout—"the limits of which were described and the names of the pilots so licensed were set forth in the notice of such licences thereupon published as directed by the said Act; and other pilots having been licensed by the said corporation for the said district, as vacancies have occurred or occasion required, the names of the pilots now licensed for such district, and the limits within which they are respectively licensed to act, are hereinafter set forth; and pursuant to an Act passed in the 6th year of the reign of His late Majesty King George IV., intituled 'An Act for the amendment of the law respecting Pilots and Pilotage and also for the better preservation of floating lights, buoys and beacons,' the said corporation of Trinity House have lately licensed pilots for the port of Southampton and the coasts near thereto, and the names of such pilots, and the limits within which they are licensed to act, are hereinafter set forth." Then it goes on to give the names of the pilots and their district, and the word "limits" is used—"limits of their licences." The limits are: Portsmouth pilots "to and from the Owers, eastward, without the Isle of Wight, to Peverell, westward, to and from those limits to all places and ports within the Isle of Wight (except the harbours of Chichester and Langstone) and into and out of St. Helen's, Spithead, Portsmouth Harbour, Stokes Bay, the Motherbank, the Southampton Water (subject to the regulation hereinafter mentioned), Cowes Road and Harbour, Yarmouth, Lymington, and the Needles, and to and from each of those ports and places." Then there are other persons mentioned whose jurisdiction is more limited, and the notice proceeds: "The names of the Cowes pilots and the limits of their licences are as follows . . . . to and from the Owers, eastward, without the Isle of Wight, to Peverell, westward, to and from those limits to all places and ports within the Isle of Wight, and into and out of St. Helen's, Spithead, Portmouth Harbour, Stokes Bay, the Motherbank, the Southampton Water (subject to the regulation hereinafter mentioned), THE ASSAYE.

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Cowes Road and Harbour, Yarmouth, Lymington, the Needles, Christchurch, and to and from each of those ports and places." Then come the names of the Southampton pilots, and the limits of their licences are as follows: ". . . . from Cowes Road, Stokes Bay, Motherbank or St. Helen's to Southampton, and from Southampton through the several channels and passages to sea." Then comes the regulation to which I have referred: "Portsmouth and Cowes pilots respectively are not to take charge of any vessel from Southampton or any part of the Southampton Water to sea unless there shall not be any Southampton pilot ready to take charge of her. Southampton pilots may supersede in the charge of any vessel bound to Southampton any Portsmouth pilot or Cowes pilot, when such vessel shall arrive at a line to be drawn from Eaglehurst to the North-West Bramble Buoy, but after she has passed such line the Portsmouth or Cowes pilot having her in charge shall not be supersedable but may conduct her to her moorings"—that would be Southampton Water; and that shews that it was thought advisable that this district should have a third set of sub-commissioners at Southampton, and that the persons examined by the sub-commissioners at Southampton and to whom licences were to be granted by the Trinity House—because the sub-commissioners had no power to grant licences—had a privilege. They had this privilege, that they might conduct a vessel from Southampton to sea, but they might not conduct a vessel into Southampton except from a line drawn from Eaglehurst to the North-West Bramble Buoy; but if there was not a Southampton pilot available at the line drawn between those two points, then the pilot who had brought her up to that point was at liberty to conduct her into Southampton Water. That was the state of things in 1844.

In May, 1853, there was in contemplation a new Merchant Shipping Act—the Act of 1854—and with a view to the preparation of that Act a return was called for from the Trinity House by the House of Commons. A return was made on May 9, 1853, by the Trinity House to the House of Commons. On p. 14 of that return, at the bottom of the page, is the following: "Cowes and Portsmouth districts"—in the plural

—"Definition of limits: From the Owers, within and without the Isle of Wight, to Peverell, and vice versâ, and to and from, and into and out of, all ports and places within those limits." Then follows a note which is not very material. On p. 16, under the same heading, "Cowes and Portsmouth districts," there appears this: "Portsmouth and Cowes pilots respectively are not to take charge of any vessel from Southampton or any part of the Southampton Water, to sea, unless there shall not be any Southampton pilot ready to take charge of her," so that the rights of Portsmouth and Cowes pilots are preserved if there is no Southampton pilot at Southampton ready to take charge, for the Cowes and Portsmouth pilots may then take the vessel from Southampton to sea. Southampton pilots "may supersede in the charge of any vessel bound to Southampton any Portsmouth pilot or Cowes pilot when such vessel shall arrive at a line to be drawn from Eaglehurst to the North-West Bramble Buoy, but after she has passed that line the Portsmouth or Cowes pilot having her in charge shall not be supersedable, but may conduct her to her moorings." Therefore a Cowes or Portsmouth pilot may take a vessel into Southampton if there is no Southampton pilot at the line from Eaglehurst to the North-West Bramble Buoy. To this extent they are still able to take charge of a vessel from the Needles to Southampton, and then there is this further provision: "Any Portsmouth or Cowes pilot who shall take charge of a vessel at any of the anchorages within the Isle of Wight, for the purpose of conducting her to Southampton, such pilot not having brought her in from sea, shall be entitled to one-third of the Southampton rate of pilotage if superseded by a Southampton pilot"—that is, at the point in question. Then I also find for the first time, on p. 38 of that return: "Southampton district: Definition of limits: From Cowes Roads, Stokes Bay, the Motherbank, and Spithead, to all ports and places within the Southampton Water, and from all ports and places within the Southampton Water to sea." Then, again, follows the regulation I have already referred to, namely, that Portsmouth and Cowes pilots respectively are not to take charge of any vessel from Southampton or any part of the Southampton Water to sea, unless there shall not be any Southampton pilot ready to take charge. On the other hand, Southampton pilots may supersede in the charge of any vessel bound to Southampton from sea, any Portsmouth pilot or Cowes pilot when such vessel shall arrive at a line to be drawn from Eaglehurst to the North-West Bramble Buoy; but after she has passed that line the Portsmouth or Cowes pilot having her in charge shall not be supersedable, but may conduct her to her moorings. That was the state of things in 1853, before the Merchant Shipping Act of 1854 was passed.

Now we come to the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104). By s. 331, "Every pilotage authority"—in this case the corporation of the Trinity House of Deptford Strond—"shall retain all powers and jurisdiction which it now lawfully possesses, so far as the same are consistent with the provisions of this Act." By s. 337, "Every pilotage authority shall deliver periodically to the Board of Trade, in such form and at such times as such Board requires, returns of the following particulars with regard to pilotage within the port or district under the jurisdiction of such authority." That word "district" clearly applies in that section to the whole district under the corporation of the Trinity House of Deptford Strond. The particulars to be given are as to the regulations in force, the names and ages of all pilots or apprentices, the service for which each pilot or apprentice is licensed, the rates of pilotage, the total amount received for pilotage, and the receipts and expenditure. Sect. 340 gives power to the corporation of the Trinity House to issue pilotage certificates to masters and mates within their district. Sect. 349 is of importance because it uses the word "limits" as apart from "district." It runs: "Every qualified pilot on his appointment shall receive a licence, containing his name and usual place of abode, together with a description of his person, and a specification of the limits within which he is qualified to act." Then follow provisions as to registration of the licence. By s. 353, "Subject to any alteration to be made by any pilotage authority in pursuance of the power hereinbefore in that behalf given, the employment of pilots shall continue to be compulsory in all districts in which the same was by law compulsory immediately before the time when this Act comes into operation; and all exemptions from compulsory pilotage then existing within such districts shall also continue in force." The section simply continues compulsory pilotage. By s. 368, "The Trinity House may, in exercise of the general power hereinbefore given to all pilotage authorities of doing certain things in relation to pilotage matters, alter such of the provisions hereinafter contained as are expressed to be subject to alteration by them in the same manner and to the same extent as they might have altered the same if such provisions had been contained in any previous Act of Parliament instead of in this Act." Sect. 369 says: "The Trinity House shall continue to appoint sub-commissioners, not being more than five nor less than three in number, for the purpose of examining pilots in all districts" (plural) "in which they have been used to make such appointments"—that must refer to the sub-districts, not to the whole of the district within the authority of the Board, but within the special district with which they are dealing in respect of this particular provision—" and may, with the consent of Her Majesty in Council, but not otherwise, appoint like sub-commissioners for any other district in which no particular provision is made by any Act of Parliament or charter for the appointment of pilots; but no pilotage district already under the authority of any sub-commissioners appointed by the Trinity House shall be extended, except with such consent as aforesaid, and no sub-commissioners so appointed shall be deemed to be pilotage authorities within the meaning of this Act." That is a very complicated section, because there is to be found in it the word "district" used in two senses. "District" in one part of the section refers to the whole district of the Trinity House of Deptford Strond, and the other is the district of the sub-commissioners. The district of the sub-commissioners, as we know, had nothing to do with licences, but only with examination; and therefore, as far as I am able to read that section, it does not affect the question of the pilotage district. It only has to deal with the sub-commissioners' district for the purpose of examination.

Sect. 370 deals with what the pilotage authority's districts are. It speaks of the Trinity House having outport districts. That with which we are dealing is one. Sect. 376 is the compulsory pilotage section: "Subject to any alteration to be made by the Trinity House, and to the exemptions hereinafter contained, the pilotage districts of the Trinity House within which the employment of pilots is compulsory are the London district and the Trinity House outport districts." Then comes a section which, for present purposes, is of importance, namely, s. 379. By sub-s. 6, "Ships passing through the limits of any pilotage district on their voyages between two places both situate out of such limits, and not being bound to any place within such limits nor anchoring therein," shall be exempted from compulsory pilotage in the Trinity House outport districts. That is the first instance in these provisions of this exemption that I have been able to discover, but which is very strongly relied upon by those who suggest that in the particular case of the *New York* there was no compulsory pilotage. On August 11, 1855, a return was made pursuant to the Act of 16 & 17 Vict. c. 129. That return, at pp. 30–32, under the heading of "Cowes and Portsmouth districts"—the word is plural—repeats the regulations I have already read, and gives the names of a long list of pilots, and also the limits of their licences. The words are not "limits of district," but "limits of licence." Then, on p. 73 of the same return will be found "Southampton district: Definition of limits," and the same particulars and regulations. So that we have, after the Act of 1854, a return shewing that the same regulations were applicable as had been applicable before that Act was passed. On April 21, 1868, there is this: "Extract from the Warden's (of the Trinity House) minutes.—A reference from the Board was considered upon the subject of the proposed consolidation of the pilotage districts" (plural) "of Cowes, Portsmouth, and Southampton into one district. It was, after deliberation, resolved to recommend to the Court that the sub-commissioners at Cowes and Portsmouth be abolished, and that one sub-commission of five members be formed at Southampton, of which the collectors at Cowes, Portsmouth, and Southampton shall be members for the management of the three districts, with the ultimate view of amalgamating the whole into one district." That was confirmed by a Court minute of May 5, 1868.

It will, therefore, be seen that the Trinity House at that time, having started with a district of Cowes and Portsmouth, and having subsequently created a sub-division of that one district at Southampton, found it advisable that that should be altered, and that there should be only one district, Portsmouth and Cowes district including Southampton Water, which we find was called the Isle of Wight district. That was carried out by the Trinity House by having a fresh page in their sub-commissioners' book, to which I have already referred. On p. 27 of that book there is a new entry, "Isle of Wight district: Definition of limits. To and from the Owers, eastward, without the Isle of Wight to Peverell, westward. To and from those limits to all places and ports within the Isle of Wight and in and out of St. Helen's, Spithead, Portsmouth Harbour, Stokes Bay, Motherbank, Southampton Water, Cowes Road and Harbour, Yarmouth, Lymington, the Needles, and Christchurch, and to and from each of those ports and places." That page begins with July 23, 1868, and goes down to June 13, 1873. So that the resolution of 1868 was carried into effect, and the pilots had jurisdiction apparently over the whole of that district as one district. In 1875 a further alteration was made: "Extract from the Warden's minutes, dated February 12, 1875.—The report of the visiting committee to the Isle of Wight district was read and the recommendation therein having been discussed, it was agreed to recommend to the Board: That the Isle of Wight district be for the future divided into two—one to be called the 'Southampton' and the other the 'Isle of Wight' district; that the limits of Southampton district be from a line drawn from the Lepe Buoy to Lee Point into Southampton, and from Southampton to the sea; that the limits of Isle of Wight district be from Peverell to the Owers, excepting within the Poole and Southampton districts." That was confirmed by a minute of March 2, 1875; and we find a

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new page entered in the sub-commissioners' book. On p. 11 there is this entry: "Isle of Wight district, Cowes and Portsmouth: Definition of limits: From Peverell to the Owers (excepting within the Poole and Southampton districts)." And then commissioners are appointed for the Cowes and Portsmouth districts, which continued from 1875 (p. 81) down to October 30, 1903, when the last entry occurs. On p. 12 we have: "Southampton: Definition of limits: From a line drawn from Lepe Buoy to Lee Point, into Southampton and from Southampton to sea." And commissioners are appointed, three not five, from February 24, 1875 (p. 96), the last entry being on June 27, 1904.

Things have so continued without alteration from that date, and the question that is raised before me is this: The *Assaye*, the outward-bound vessel, started from Southampton, and she was bound out to sea. She was in charge of a pilot who had a licence to take that vessel from Southampton to sea, and that was compulsory; therefore, she was under compulsory pilotage.

The *New York* was a vessel which had come from America, touching at Cherbourg, and was on her way from that port to Southampton. She was boarded by a pilot who was licensed to take charge of vessels from Peverell to the Owers, excepting within the Poole and Southampton districts. He was licensed for the spot at which the collision took place. Therefore the position was this: That the pilot was licensed to take the vessel as far as where the Southampton district begins—that is, to a line drawn from Lepe Buoy to Lee Point. That was within the original district of the Trinity House of Deptford Strond, from the original date I have given—1809.

The question is whether the *New York* comes within the words of s. 605 of the Merchant Shipping Act, 1894: "The master and owner of any ship passing through any pilotage district in the United Kingdom on a voyage between two places both situate out of that district, shall be exempted from any obligation to employ a pilot in that district or to pay pilotage rates when not employing a pilot within that district." Now the word "district" is the whole point. Has that district which was originally started in 1809 ceased to be the district within the meaning of this section? As I read the section and the regulations and the various reports, the Trinity House have never altered the district—this district from Peverell to the Owers. What they have altered are the limits of the pilots' licences. They have varied from time to time the limits within which various pilots shall have power to navigate ships under their compulsory power, and there is a section in one of the Acts—s. 369 of the Act of 1854—which says that "no pilotage district already under the authority of any sub-commissioners appointed by the Trinity House shall be extended except with" the consent of Her Majesty in Council. It is very puzzling to know exactly what that means; but my view is that the Trinity House of Deptford Strond, having originally got this one district, the Cowes and Portsmouth district, which included Southampton Water, have never altered that district. They have made sub-districts in it, but the one district has never been altered—that is the district from the Owers Lightship, eastward, to Peverell, westward. Although for purposes of internal convenience they have made regulations from time to time varying the jurisdiction of the sub-commissioners who are to examine pilots, and although they have made different arrangements as to the licences, that is to say, the extent to which any particular person may hold a licence, still one district remains as the pilotage district in that particular part of England under the authority of the Trinity House of Deptford Strond.

I do not think that this particular exemption section renders a vessel free from compulsory pilotage if she is coming from a port outside that district into Southampton. I think she is still within the district of the Isle of Wight, of which Portsmouth and Southampton originally consisted, and that she was under compulsory pilotage in the Solent, as being a part of the original district, which has never really been altered, that is to say, there is only one district although it has been sub-divided from time to time for convenience. For these reasons I think the *New York* was also subject to the law of compulsory pilotage and that the judgment of the President saying that these two pilots were the persons who

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were to blame for this collision is to be read as meaning that the vessels were exempted in consequence of their being under compulsory pilotage—that is to say, the pleas of compulsory pilotage raised by both sides will be upheld, and there will be no costs on either side.

Solicitors for plaintiffs, owners of the *New York*: *Thomas Cooper & Co., for Hill, Dickinson, Dickinson, Hill & Roberts, Liverpool.*

Solicitors for defendants, owners of the *Assaye*: *Freshfields.*

T. L. M.

Applied. THE CARSLOGIE [1951] P. 167

[IN THE COURT OF APPEAL.]

C. A.

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June 26.

THE HAVERSHAM GRANGE.

Admiralty—Damage by two Collisions—Simultaneous Repairs—Dock Dues—Demurrage—Division between Tortfeasors.

Explained. CARSLOGIE S.S. Co. *v.* NORWEGIAN GOVT. [1952] A.C. 292

In order to effect repairs necessitated by two collisions for which the owners of two wrong-doing vessels were liable, the plaintiffs, the owners of the damaged vessel, put her into dry dock, and proceeded to repair at the same time the separate damage sustained in each collision; but the defendants, the owners of the wrong-doing vessel in the second collision, objected to pay any portion of the dock dues on the ground that the repair of the damage caused by their vessel occupied a shorter time than that required for the repair of the damage sustained in the first collision, so that the plaintiffs had not been put to any additional expense:—

Held, by the Court of Appeal (Collins M.R. and Romer L.J.), reversing the decision of Sir Gorell Barnes, President, that the principle as to apportionment of expenses between owner and underwriter in respect of dry-docking for simultaneous work on the vessel, laid down in *The Vancouver*, (1886) 11 App. Cas. 573, and explained in *The Ruabon*, [1900] A. C. 6, applied, and, therefore, the defendants were liable for a proportion of the dry-docking and incidental expenses, excluding demurrage.

APPEAL by plaintiffs, Samuel J. Ditchfield and others, owners of the *Maureen*, against a decision of Sir Gorell Barnes, President, in an action of damage by collision, confirming a report of the registrar in favour of the defendants, the owners of the *Haversham Grange*.

The case is reported on the question whether the principle laid down in *The Vancouver* (1), as to the division of the cost of dry-docking between owner and underwriter, is applicable, after two collisions, to the second wrong-doer so as to render him liable to the owner of the damaged vessel for a proportion of dock dues, though the repairs necessitated by the first collision occupied more than the time required for the repairs for which the second wrong-doer was liable.

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(1) Reported in the House of Lords as *The Marine Insurance Co., Ld. and the China Transpacific Steamship Co., Ld.*, 11 App. Cas. 573.

On December 25, 1904, the steamship *Maureen*, from Sunderland to London with a cargo of coals to be discharged at Beckton Jetty, was run into in Gravesend Reach of the river Thames by the steamship *Caravellas*, and sustained damage forward on the stem and bows. On the following day, when lying off Beckton Jetty, the *Maureen* was run into by the *Haversham Grange* and damage done to her starboard side and to the bilge keels. The owners of the *Caravellas* agreed to a decree of both to blame, and for the repair of the damage caused by their vessel it was necessary for the *Maureen* to go into dry dock. The owners of the *Haversham Grange* admitted liability for the damage caused by their vessel, to repair which it was also necessary for the *Maureen* to go into dry dock. The two sets of repairs were subsequently carried out, the dry dock being engaged for each set of repairs at one and the same time, and the repair of the damage done by the second wrong-doer did not increase either the amount of the dock dues or the length of time during which the repairs were in progress. The owners of the *Maureen*, however, having recovered only 50 per cent. of their loss from the owners of the *Caravellas*, sought to charge the owners of the *Haversham Grange* with the following items as their half-share of dock dues and demurrage:—

	£	*s.*	*d.*
1. Shifting the *Maureen* from her discharging berth to dry dock for repairs . . .	11	17	6
2. Docking and shoring vessel. . . .	6	5	0
3. Dry dock dues	24	0	0
4. Adjusting compasses	2	0	0
5. Loss of the use of the *Maureen* in and about repairs for three days (the time occupied was six days)	122	17	3

The cost of the repairs to the *Maureen*, amounting to 198*l*. 17*s*. 7*d*., rendered necessary by the collision with the *Haversham Grange*, formed a separate item and was not disputed. The above amounts were also admitted to be correct if the owners of the *Haversham Grange* were liable.

The vessel was in dry dock twenty-two days on account of the damage done by the *Caravellas*, and the repairs consequent on the collision with the *Haversham Grange*, which were carried out at the same time, occupied six days.

At the reference, the defendants, the owners of the *Haversham Grange*, objected to the above items on the ground that, as the collision between the *Maureen* and the *Caravellas* happened first and it was necessary for the *Maureen* to go into dry dock for repairs consequent on that collision, the dry dock dues and other expenses would have been incurred in any event, and, therefore, the owners of the *Maureen* could not recover any part of them from the owners of the *Haversham Grange*.

On April 14, 1905, the registrar made his report disallowing the above items of the plaintiffs' claim, and on May 17 Sir Gorell Barnes, President, on motion in objection to the report, upheld the decision of the registrar on the ground that the sole question was: what amount of damage the second wrong-doer had done beyond what had already been done by the first, and that practically the extent of the depreciation of the ship was to be measured by the cost of repair, which cost of repair included dry-docking; but if, for another reason, the ship was being repaired, involving dry-docking, then, as it added nothing to the expense that the repair of the damage occasioned by the second wrong-doer was done whilst doing something it was necessary to do, it followed that no part of the dock dues were an additional expense falling upon the second wrong-doer.

With regard to the demurrage, the learned judge held that, as the vessel was already incapacitated by something which had previously happened before the second wrong-doing ship ran into her, the repair of the damage done by the second collision did not in any way delay her, and therefore the second wrong-doer was not responsible for any part of the delay which he had not in fact caused.

On appeal:—

Laing, K.C., and *Dawson Miller*, for the appellants (plaintiffs), owners of the *Maureen*. The items in question should have been allowed, for the ground taken by the defendants, the owners of the *Haversham Grange*, that they were necessary items resulting from the first collision, and therefore not part of the damage occasioned by the second collision, is untenable. The separate acts of two wrong-doers gave rise to two sets of repairs which had to be done to the hull of the vessel to make her seaworthy, and the owners of the vessel were entitled to judgment against each wrong-doer for the separate damage done by him. There was no obligation on the owner to do the two sets of repairs at the same time, but it was desirable in the interests of all parties that the work should be done together. Neither set of repairs could be carried out without dry-docking, and, in respect of the dock dues so incurred, the principle laid down in *The Vancouver* (1) applies. There the owner, and the underwriter through the owner, were both using the same dock for their own purposes, and it was held that there must be a division of the cost. This view is fortified by the distinction drawn in the case of *The Ruabon* (2), where the dry dock was being used in respect of repairs for which the underwriters were liable, and the owner took advantage of the opportunity to do other work which, not being necessary at that time to make the vessel seaworthy, involved no obligation to contribute towards the expenses incurred in the use of the dock; but Lord Brampton in that case is careful to say that contribution does arise "where work is done to the vessel itself, by two . . . . persons, each separately and simultaneously engaged under different obligations in doing portions of it, dry-docking being necessary for each." So in *The Acanthus* (3), where the plaintiffs' vessel was dry-docked in order to repair the damage sustained in a collision for which the defendants were liable, and the plaintiffs, without causing delay or increasing the dock expenses, took advantage of the opportunity to fit her with bilge keels, it was held that the defendant wrongdoers were not entitled to any contribution towards the expenses. Neither of these cases conflict with *The Vancouver* (1), but illustrate the proposition that there is no principle of law which requires that a person should contribute to an outlay merely because he has derived a material benefit from it.

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(1) 11 App. Cas. 573.

(2) Reported in the House of Lords as *The Ruabon Steamship Co., Ld. and the London Assurance*, [1900] A. C. 6.

(3) [1902] P. 17.

Here the vessel was not solely dry-docked for the repairs necessitated by the first collision, and it is admitted that, in order to ascertain the cost of repairs such as those resulting from the damage done by the *Haversham Grange*, the dry-dock charges must be included.

[The claim for demurrage was abandoned.]

Aspinall, K.C., and *Maurice Hill*, for the respondents (defendants), owners of the *Haversham Grange*. An injured party can only recover the damage actually done by a wrongdoer, and here the damage done by the *Caravellas* was so severe that, before being again damaged by the *Haversham Grange*, it was necessary for the *Maureen* to go into dry dock—that is to say, taking the cost of repairs as a measure of depreciation, the vessel was depreciated to such an extent that an expense, represented by twenty-two days in dry dock, had to be incurred. The repair of the damage done by the *Haversham Grange* did not increase this expense, nor lengthen the time during which the repairs were in progress—in other words, the owners of the *Maureen* were not put, as regards dock dues, to any more expense by the collision with the *Haversham Grange* than they would have been put to without that collision, and, therefore, the items in dispute were properly disallowed by the registrar.

The Vancouver (1) has no bearing on this case. There a contractual relationship existed, and the only question was whether the particular average loss exceeded 3 per cent. within the meaning of the warranty contained in a policy of assurance. *The Ruabon* (1) admittedly has no application, and *The Acanthus* (2) only followed the latter case.

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(1) 11 App. Cas. 573.

Laing, K.C., in reply.

COLLINS M.R. The point to be decided in this case is whether one of two tortfeasors — I call them tortfeasors, because some stress has been laid in the argument on the fact that they are tortfeasors—who is the owner of a vessel which caused the damage to a particular ship by coming into collision with her, is entitled to say that the damage in respect of the particular collision for which he is responsible must be measured by excluding altogether the cost to which the owner of the injured vessel was put in dry-docking that vessel, inasmuch as the vessel would have had in any case to be dry-docked to repair the damage already inflicted by the earlier collision with another vessel belonging to the other tortfeasor.

The steamship *Maureen* was coming up the Thames, and a ship called the *Caravellas* came into collision with her and did very considerable damage. Afterwards, as she proceeded further on her course, another vessel, called the *Haversham Grange*, came into collision with her also—on the other side apparently—and did damage, but nothing like to the extent of that already caused by the collision with the *Caravellas*. The vessel had to be put into dry dock, and the repairs rendered necessary by both collisions were carried out at the same time while the ship was in dry dock, and the shipowner claims that, in assessing his damage against the *Haversham Grange*, which was the second ship which came into collision with his vessel, he is entitled to include in his measure of damage against the second ship a proper proportion of the dry-dock expenses.

On the other hand, the owners of the *Haversham Grange* contend that what they damaged was a damaged ship, and they say, "You cannot charge us with any part of the cost of putting the ship into dock, because, when we came into collision with your vessel, she was already damaged, and a vessel in that damaged condition would have been bound to go into dry dock whether we ever touched her or not; so that the

(1) [1900] A. C. 6.

(2) [1902] P. 17.

cost of dry-docking must fall on the first tortfeasor, and not upon us."

Now, is that contention right? The learned judge in the Court below has upheld the view taken by the registrar that no part of the cost of putting the injured ship into dry dock ought to be claimed against the second wrong-doer, the owner of the *Haversham Grange*; but, on considering the whole matter with the assistance of the arguments of counsel, I have come to the conclusion that the principle laid down in *The Vancouver* (1), decided in the House of Lords under the name of the *Marine Insurance Co.* v. *China Transpacific Co.* (2), covers this case. It seems to me, according to the well-known practice of the Admiralty Court, that what we have to ascertain in this case is—What ought to be taken as the cost of repairing the damage done by the wrong-doer? No doubt—as counsel for the respondents have pointed out—this is a tort, and the liability of a tortfeasor is measured by the extent of the damage done. Whether the ship is repaired or not is immaterial, but practically, in ascertaining what the amount of the damage is, the standard adopted is the cost of effecting the repairs rendered necessary by the wrong-doer. In this particular case the ship was put into dock for the purpose of effecting the repairs, and the right of the shipowner was to recover against each of the tortfeasors all the costs attributable to the wrong committed by him, and therefore, as against each wrong-doer, it seems to me the only question is: What was the cost of repairing the particular damage done by the particular wrong-doer, for the result of the two wrongs together was that the ship had to go into dock, and the whole mischief was repaired? A sum had to be done to ascertain what the total cost of all the mischief was, and to apportion between the two delinquents the particular part of the cost attributable to the wrong caused by each of them, and it seems to me, upon the principle of *The Vancouver* (1), so far as there was a common factor in the case, and to the extent of the docking expenses common to the process of repairing the mischief done

(1) 11 App. Cas. 573. (2) 11 App. Cas. 573.

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by each of them, there must be apportionment between the owners of the two ships in fault. The principle in *The Vancouver* (1) was laid down clearly in the judgment of Lord Herschell, and in attempting to summarize it in the case of the *Ruabon Steamship Co.* v. *London Assurance* (2), subject to a qualification which has been introduced by the *Ruabon Case* (2), I think I have expressed the principle. I said in that case (3): "I think the principle of that case—that is, the *Vancouver*—is that, where repairs in respect of damage for which underwriters are liable have been executed simultaneously with repairs as to which the owner is uninsured, and an expense has been incurred which would have been necessary for either purpose alone, such expense is not to be wholly attributed to one set of repairs alone, but forms a factor in the cost of each, and must therefore be divided between them in some proportion, which primâ facie would be equally. The problem really is to find the cost at which each set of repairs has been executed. Each has been executed at a less cost, because there is a common factor in the expenses which has inured to the benefit of both, and, in stating an account of the cost of each, the person carrying out the repairs would be bound to debit each set with a proportion of the common items. This is a perfectly simple and intelligible principle and applies to this case." I adhere to that statement subject to the qualification which has been introduced by the case of *Ruabon Steamship Co.* v. *London Assurance* (2), that the repairs must have been such as in the circumstances the owner of the ship had no alternative but to have executed. It does not apply to a case where the shipowner avails himself of the ship being in dock as a convenient opportunity for doing the repairs, but it does apply to a case in which he could not avoid going into dock to do either repairs, and where all repairs were in fact done. I find the same statement of principle in the judgment of Lord Brampton in the *Ruabon Case*. (2) He says (4): "Since the decision of the *Vancouver Case* (1), by which, of course, we are bound, and which to me seems to be founded on good sense, it is not, in my opinion, open to question that where two operations are essentially necessary to be performed upon the hull of the ship in order to render her in a condition to justify a prudent owner in sending her again to sea—one of such operations being to effect repairs for the cost of which underwriters are responsible—the other to clean and scrape the ship necessitated by wear and tear, the cost of which must be borne by the owners themselves, and neither of such operations could be performed unless the ship were dry-docked, and both of which operations the owners and underwriters, or owners acting for themselves and also for the underwriters, deem it expedient should be performed at one and the same time, or that one should immediately follow the other without any substantial interval under one continuous dry-docking: in such cases the cost of docking and all dock dues during the period the vessel is in dock must be shared in proportion, having regard to the period of joint or separate actual use of it."

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(1) 11 App. Cas. 573.

(2) [1900] A. C. 6.

(3) [1898] 1 Q. B. 722, at p. 732.

(4) [1900] A. C. at p. 16.

Now in the present case there is no doubt that the conditions described by Lord Brampton existed—that is, that two operations were essentially necessary—because both sets of repairs were essentially necessary; and, therefore, the case primâ facie seems to me to come directly within the principle laid down in *The Vancouver*. (1) It is said, however, that that case dealt only with questions between an uninsured owner as to one part of the repairs and an underwriter who was bound to indemnify as to the other part of the repairs, and that, therefore, that case is distinguishable from this case, where the two parties concerned are both tortfeasors. At one time I thought it was suggested that there was some difficulty arising by reason of the rule that there could be no contribution between two tortfeasors; but neither the decision of the Registrar nor that of the President proceed on that ground.

The argument appears to be that a tortfeasor is in a different

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(1) 11 App. Cas. 573.

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position, and in a better position, than the underwriter, and that he is somehow—I cannot quite understand the position—although bound to indemnify, inasmuch as he is a tortfeasor, and bound to make good the damage he has caused, yet that he is in a better position than an underwriter whose contract is to indemnify. I fail to realize that position, and I think if it is once established that the measure of the liability is the cost of repairing the damage done, then it becomes simply a question of arithmetic, and the principle of *The Vancouver* (1) obliges me to hold that the case cannot be treated so as to regard the fact that the first set of repairs had to be done as excluding all obligation on the part of the second tortfeasor —in respect of the second set of repairs when they have been executed—to pay for his proportion of the common cost incident to both sets of repairs. When you have once determined the cost at which the repair has to be done, and find out what part of those costs each of the wrong-doers has to pay, it seems to me the principle laid down in *The Vancouver* (1) obliges you to treat the common factor in the process as costs of repair which must be divided in their proper proportion. For these reasons I think that the learned judge in the Court below was wrong in holding that the measure of the liability of the *Haversham Grange* must be ascertained in view of the fact that there was a consummated wrong by one tortfeasor which would have certainly involved the cost of dry-docking the ship, whether or not any other wrong had been committed, and that that excludes any possible liability on the part of the second wrong-doer to contribute to such expenses.

It seems to me that the case resolves itself into a question of the proper way of computing the cost of the repairs, which is the ordinary way of ascertaining the damage to be recovered from a wrong-doer, and that upon that account the common items, as I have said, should be divided. That disposes of the appeal so far as the expenses of dry-docking are concerned.

There is another matter which raises a question entirely independent of the principles I have been discussing, and that is the claim for demurrage—that is, for the detention of the ship, and the loss which has been referred to. It turns out that the ship must have been, and in point of fact was, detained the whole time in dock by the repairs which had to be executed in consequence of the damage done by the first of the two ships, the *Caravellas*, and that in point of fact although the repairs occasioned by the *Haversham Grange* were done simultaneously, the ship was not detained an hour longer by reason of that fact. In view of that state of things, it seems to me impossible to say that any claim for demurrage exists against the *Haversham Grange*, and that, therefore, so far as that part of the case is concerned, it must be dismissed. With regard to the other point, the appeal must be allowed.

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(1) 11 App. Cas. 573.

Romer L.J. I have come to the same conclusion with regard to the dock dues, and also on the other point. I will only add a few words with regard to the dock dues. Two injuries had been occasioned to the *Maureen* by two collisions, one with the *Caravellas* and the other with the *Haversham Grange*, the latter being the second in point of time. It was after both accidents had happened that the injured vessel was taken to the dry dock, and while she was in the dry dock the dock was used for the joint purpose of repairing the damage caused by each collision. In that state of things I think it is reasonably clear that the ship was taken into dock, and the dock was utilized for the purpose of both injuries, so that the owner of the ship that occasioned the second injury could not say that the dock had not been also used to repair the damage for which he was liable.

It is a case where the *Haversham Grange* was liable for the injury caused by a second collision, and the dock was used for the purpose of doing repairs rendered necessary by the injury that she had occasioned. That being so, it appears to me that you have a case of user of a dock for two parties to repair separate injuries, each of which required docking to enable the injuries to be repaired, and it appears to me also that, upon

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principle, that being so, and so far as concerned the dues at entry, you ought to consider that the dues were incurred on behalf of both; and, so far as they were common dues used in repairing, the owners of both ships in fault are liable for those dues utilized on behalf of both. I think that was the principle clearly laid down in *The Vancouver* (1), as interpreted and explained by the case of the *Ruabon Steamship Co.* v. *London Assurance* (2), and especially by the judgment of Lord Brampton in the House of Lords.

It appears to me that the principles laid down in those cases apply with regard to these dock dues. It was urged, however, that in some way because the injury occasioned by the *Haversham Grange* was second in point of time that some special benefit thereby accrued to the *Haversham Grange* in respect of the costs of the dock dues. It was said that, as between the injuries occasioned by the *Caravellas* and the injuries occasioned by the *Haversham Grange*, you ought to treat the earlier damage caused by the *Caravellas* as throwing upon the owners of the *Caravellas* or upon the owners of the damaged ship some sort of liability towards the owners of the *Haversham Grange* to put the damaged ship into dock and to pay the expenses of the docking, so as to give the full benefit of those expenses to the owners of the *Haversham Grange* without any liability to contribute on their part. In other words, that because the injury done by the *Haversham Grange* was second in point of time, therefore the docking must be held to be done wholly for the purpose of repairing the earlier damage. To my mind that is not an accurate way of looking at the matter. It appears to me that, both injuries being done, it cannot be contended that there is any right on the part of those who occasioned the second injury to say that there was any obligation on the part of those who had occasioned the first injury to free the persons who had occasioned the second injury from any part of the obligations they otherwise would have incurred if there had been no earlier damage at all. To my mind it is clear, as I have said, that

(1) 11 App. Cas. 573.

(2) [1900] A. C. 6.

where the docking was done on behalf of both, then both ought to contribute, in accordance with the principle laid down in the *Vancouver Case* (1), as explained in the *Ruabon Case.* (2)

Appeal allowed as to dock dues, dismissed as to demurrage; no costs.

Solicitor for appellants (plaintiffs), the owners of the *Maureen*: *Charles E. Harvey.*

Solicitors for respondents (defendants), the owners of the *Haversham Grange*: *William A. Crump & Son.*

T. L. M.

IN THE ESTATE OF F. J. CLEAVER.

1905
Aug. 7.

Probate—Practice—Administration pending Suit—Concurrent Suits in Chancery and Probate Divisions—Creditors—Sureties.

In a creditors' action in the Chancery Division for the administration of the estate of a deceased person, the defendants in that action being respectively the plaintiffs and defendants in a probate suit relating to the testamentary documents of the deceased, the Probate Division, on the application of the plaintiffs in the Chancery action, who were, however, not parties to the probate suit, appointed as administrators pendente lite the same persons who had been appointed receivers by the Chancery Division, and with the same surety.

MOTION for administration pendente lite.

Frederick John Cleaver, late of 17, Orsett Terrace, Hyde Park, died on May 17, 1905, leaving a will dated May 4, 1905, whereby he appointed the plaintiffs Howard Crunden Cleaver and Ralph Cleaver executors. The deceased had previously executed a will dated March 24, 1905, whereby he had appointed the said Ralph Cleaver and the defendants Amy Jane Cleaver (widow) and William Dymes Stevenson executors.

On May 19, 1905, a writ was issued in the Chancery Division by creditors of the deceased against the persons who were plaintiffs and defendants in the probate action, asking for administration of the deceased's estate and for all necessary accounts and inquiries and for the appointment of a receiver;

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(1) 11 App. Cas. 573.

(2) [1900] A. C. 6.

and on May 19, 1905, an order was made in the Chancery proceedings appointing the present plaintiffs receivers, and such appointment was continued by a subsequent order dated July 16, 1905.

There was no real estate, and the personalty consisted chiefly of the deceased's interest in a large manufacturing business, other assets being horses, live stock and furniture, carriages, and effects.

A caveat having been entered, the writ in the probate action was issued on July 19, 1905, wherein the plaintiffs, as executors, propounded the last will of the deceased. The defendants appeared thereto in due course.

The creditors (plaintiffs in the Chancery proceedings) now applied, on motion, for the appointment of the present plaintiffs or some other fit and proper persons or person as administrators pendente lite, and notice of the motion was served on the plaintiffs and defendants in the probate action.

[Sir Gorell Barnes, President. The applicants are not parties to the probate suit. How can they apply here?]

Bayford, for the applicants, relied on *Tichborne* v. *Tichborne*. (1)

Willock, for the plaintiffs. The applicants should not have applied. The plaintiffs would have done so in due course.

Sir Gorell Barnes, President, appointed the plaintiffs administrators pendente lite, it being understood that the bond of a guarantee society which had been accepted in the Chancery receivership would be extended, for a small additional premium, so as to cover the present appointment.

Solicitors for creditors (applicants): *Foss, Ledsam & Blount.*
Solicitors for plaintiffs: *Bird & Eldridge.*
Solicitors for defendants: *Ward, Bowie & Co.*

H. D. G.

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(1) (1869) 38 L. J. (P. & M.) 70.

IN THE ESTATE OF JAMES LUPTON.

1905
July 31;
Aug. 11.

Will—Construction—Absolute Gift cut down, by later Words, to Life Interest —Administration (with Will annexed) to Residuary Legatee.

A will made upon a printed form with holograph additions purported to leave all property both real and personal belonging to the testator to the testator's wife "for her own absolute use and benefit . . . . subject only to the payment of" debts and funeral and testamentary expenses, the wife being appointed sole executrix . . . . "and after her death to come absolutely to" M. A. H. "to her and her heirs for ever" after payment of 20*l.* to two sisters (named) of M. A. H.:—

Held, that, looking at the terms of the whole will, the widow took only a life estate, and that M. A. H., as residuary legatee, was entitled to a grant of administration with the will annexed, in preference to the executor of the widow, who had died without taking probate of the will in question.

MOTION for a grant of administration, with will annexed, to the person named therein as residuary legatee.

The whole question turned on the construction of the will.

James Lupton, the testator, died on February 13, 1904. His wife, Mary Ann Lupton, survived him, but died without taking out probate. She left a will, which was proved by her executor. The estate of James Lupton consisted of both realty and personalty, valued at about 1300*l.* in all.

The present application was made on behalf of Mary Ann Austerberry (otherwise Hartshorn), the person claiming to be residuary legatee and devisee according to the true construction of the will. Notice of the motion was served on all the persons who would be interested in the estate in the event of intestacy or partial intestacy; and the executor of Mary Ann Lupton also had notice.

The will was upon a printed form, which the testator had filled in or supplemented in his own handwriting. It was (verbatim et literatim) as follows:—

"This is the last will and testament of me James Lupton of Grasmere Grassington in the county of York made this first day of May in the year of our Lord one thousand eight hundred and ninety seven. I hereby revoke all wills by me at any time heretofore made. I appoint to be my executor, and direct that all my just debts and funeral and testamentary expenses shall be paid as soon as conveniently may be after my decease.

"I give and beqeath unto my wife Mary Ann Lupton all my messauges lands or tenements heareditaments and all my household furniture ready money goods and chattles and all other of my real and personal estate and effects whatsoever and wheresoever to and for her own absolute use and benefit according to the nature and quality thereof respectively subject only to the payments of all my just debts and funeral expences and charges of proving and registring this my will. And I appoint my said wife my executrix of this my will and hearby revoke all other wills. In witness I have here unto set my hand the day and year above written. Sined and acknowledged by me the said James Lupton as and for his last will and testament and after her death to come absolutely to Mary Ann Austerberry know Mary Ann Hartshorn to her and her heirs for ever after twenty pounds been paid out to each of her sisters Annis Hutchinson and Ada Lee then to come to Mary Ann Hartshorn and her heirs for ever; also I give my gold watch and albert to my adopted son Willie Earnshaw comonley called Willie Lupton for his absolute use.

Signed by the testator in the presence of us present at the same time, who at his request and in the presence of each other have subscribed our names as witnesses.

James Lupton.

1st Witness—
William Walton,
Grassington,
Builder.
2nd Witness—
Thomas Pletts,
Grassington,
Joiner and
Builder."

Bayford, for the applicant. The Court, for the purpose of ascertaining the intention of the deceased with regard to his will, will consider the language of the whole will.

[Sir Gorell Barnes, President. Has it not been decided that where the first gift is absolute there is nothing else to give? If so, you have no interest.]

1905

LUPTON, IN THE ESTATE OF.

Is not this a case for a grant under s. 73? There is no executor here able or willing to take probate, the widow being dead.

[SIR GORELL BARNES, PRESIDENT. You must look up the Chancery authorities.]

Later in the day the argument was resumed by

Bayford, for the applicant. *In re Bagshaw's Trusts* (1) was a case in which the earlier gift in a will was held to be cut down. *In re Hanbury; Comiskey and Others* v. *Bowring-Hanbury and Another* (2), was another case. The authorities are collected in Theobald on Wills, 5th ed. pp. 454, 455. The strongest authority in the contrary direction to the two cases just cited is *Corbett* v. *Corbett.* (3)

Cur. adv. vult.

Aug. 11. SIR GORELL BARNES, PRESIDENT. The whole question turns on the construction of the will. I have examined the cases referred to in argument or collected in Theobald on Wills. Two of them seem to be more particularly in point. In the report of *Sherratt* v. *Bentley* (4) the head-note does not give the exact facts. In that case there was first a direction to pay debts, &c., and then a gift of 400*l.* to the executors upon certain trusts, and then the will proceeded to give to the wife certain messuages: "and all other my real estates whatsoever and wheresoever, and also all my household goods, furniture, implements of household, the stock upon my farm, as well quick as dead, and also my ready money, monies out upon securities, and all other my personal estates whatsoever and wheresoever, and of what nature or kind soever, to hold to my said wife, her heirs, executors, administrators, and assigns, for ever." After a number of specific legacies, the will wound up as follows: "I also further give, devise, and bequeath unto William Allen, junr., of the Windy Bank, and the whole of my brother-in-law, William Sherratt's, children, the rest,

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(1) (1877) 25 W. R. 659.

(2) (1905) A. C. 84.

(3) (1888) 14 P. D. 7.

(4) (1833–4) 2 My. & K. 149; 39 R. R. 168.

1905

LUPTON, IN THE ESTATE OF.

The President.

residue, and remainder of my real and personal estates, of what kind and sort soever and wheresoever, to be equally divided amongst them, share and share alike, at the decease of my said wife, Margaret Harrison." Practically that was a gift to the wife of the property to begin with, and then a gift over to certain persons of practically the same property at the death of the wife. The question was thereupon raised as to what was the true effect of the gift, and it was held that she only took a life interest. The last part of the judgment of the Lord Chancellor (Lord Brougham), to whom the case went on appeal, was as follows: "The testator gives her" (Margaret Harrison) "the fee simple immediately on his own decease. He afterwards gives that fee simple to others, not immediately on his own death, but in remainder expectant on the determination of Margaret Harrison's life. Either, therefore, he had changed his intention, and was minded to give her a life estate instead of the fee he had at first given her, or he was ignorant of the force of the words he had originally used; and those words must be rejected as having been used by mistake. The former alternative is the one to which the rule sanctioned by modern decisions, as well as by Lord Coke's opinion, leads. The latter is the inference drawn, not unfairly, from the whole instrument taken together. For if probabilities are to be weighed, it is much more likely that the testator did not well understand the force of the words he used in giving the residue to the wife, than that he was ignorant that he was giving to W. Allen and J. Sherratt's children an interest which should only take effect after his wife's decease—the period he expressly fixes. His wife's life interest seems more than once to have been distinctly in his contemplation in the course of the will; for he declares that the legacies first given shall not take effect till a year after her death. Either supposition, however, will suffice to support the conclusion, which I adopt, that she only took a life interest."

In the case of *In re Bagshaw's Trusts* (1) it was also held that the wife took only an estate for life, and the last sentence of Baggallay L.J.'s judgment in the Court of Appeal was as

(1) (1877) 25 W. R. 659.

follows: "It appears to me that the dispositions of the personal estate indicate the desire and intention of the testator to provide for his wife and his children, and that the provisions as to the appointment of new trustees point to the intention in the mind of the testator that the trusts of the personal estate should continue after the death of his wife." The mode of construction adopted there was that the whole will must be looked at, and that, although there was an absolute gift to the wife in the first place, there was afterwards a gift to the children, which was effectual. I do not think any large number of cases are required to deal with a point of this kind. The two cases I have referred to appear to be almost precisely in point. Subject to the general rules of construction, considering the later words of the will now before me, and looking at the whole tenor of the will, I cannot help thinking that the testator, who was a very ignorant and illiterate man and probably did not appreciate the effect of the earlier words, really must have meant that his wife should take a life interest, and that the present applicant should take the estate after the death of the testator's wife. I hold, therefore, that the applicant is residuary legatee under the will, and entitled as such, according to the practice, to apply for a grant of administration with the will annexed.

Solicitors for applicant: *Andrew, Wood, Purves & Sutton, for J. Hewitt, Barnsley.*

H. D. G.

1905
Oct. 30.

IN THE ESTATE OF ISABELLA WALLAS.

Administration—Intestacy—Divorce—Former Husband passed over without Citation—Probate Act, 1857 (20 *&* 21 *Vict.* c. 77), *s.* 73—*Sureties required to justify.*

A divorced spouse, whether petitioner or respondent, ceases to have an interest in the estate of the other party to the dissolved marriage who subsequently dies intestate; and, in such a case, the Court will pass over the surviving spouse without citation, but, in granting administration to the next of kin, will require the sureties to the administration bond to justify.

MOTION for administration under s. 73 of the Probate Act, 1857.

Isabella Wallas died intestate on October 9, 1904, leaving estate amounting to 61*l.*

Her next of kin were two sons, one of whom was the present applicant.

Joseph Noble Wallas, the husband of the intestate, left her in 1885, and, after visiting various countries and returning to England, went to America, and, in 1891, obtained a divorce in Ohio on the ground of her alleged wilful absence. (1) His last letter to his mother, written about 1893, stated that he was ill in hospital at Chicago, but inquiries and advertisements had failed to trace him since then, or to elicit whether he was now alive or dead.

He had not been cited.

Bayford, for the applicant. There is authority for granting administration to next of kin without citing a spouse who has been divorced for his or her misconduct: *In the Goods of Nares.* (2) The ground for that appears to be that the divorced spouse has, by the dissolution of the marriage, ceased to be interested in the estate of the petitioner. The same principle should be held applicable in a case like the present, where the spouse whom the Court is asked to pass over without citation was the petitioner and obtained the divorce. By obtaining the decree he elected to forfeit his interest in the intestate's estate. [He also referred to *In the Goods of Chapman.* (1)]

---

(1) No question appears to have been raised as to the validity of this divorce in our jurisdiction.—F. P.

(2) (1888) 13 P. D. 35.

BARGRAVE DEANE J. The grant may go, but, following *In the Goods of Stevens* (2), the sureties must justify.

Solicitors: *Harrison & Powell.*

(1) [1903] P. 192.

(2) [1898] P. 126.

H. D. G.

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DIVORCE—*Adultery of the Wife—Cruelty of the Husband—Discretional Bar—Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 31—*Allowance to be secured to guilty Wife—Restrictive Conditions—Dum casta et sola vixerit.*

The Court, in exercising its discretion in favour of and granting a divorce to a husband who had previously been judicially separated on the ground of his cruelty, ordered that the decree dissolving the marriage should not be made absolute unless and until the husband should secure an allowance of 52*l.* a year, payable weekly, to the divorced wife.

The principles which guide the Court in ordering an allowance in such cases, and the rules which lead the Court to determine on the insertion of a dum sola et dum casta clause, considered and discussed. Squire *v.* Squire and O'Callaghan - - - Jeune Pres. 4

2. —— *Condonation—Adultery—Desertion—Revival—Decree of Dissolution of Marriage.*

Desertion for two years without reasonable excuse revives condoned adultery, whether the petitioner be husband or wife.

Houghton v. *Houghton*, [1903] P. 150, followed. Copsey *v.* Copsey and Erney Gorell Barnes J. 94

3. —— *Costs—Security—Practice—Wife's Costs—Previous Order for Separation—Effect—Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 26—*Summary Jurisdiction* (*Married Women*) *Act*, 1895 (58 & 59 *Vict. c.* 39), *s.* 5, *sub-s.* (*a*).

Notwithstanding the words of s. 26 of the Matrimonial Causes Act, 1857, and the construction placed thereon by the decision of the Court of Appeal in the case of *In re Wingfield & Blew*, [1904] 2 Ch. 665, the Divorce Court has power to direct a husband, whose wife has obtained a separation order against him, to find security for such costs of the wife as may be considered necessary to enable her to bring a suit for dissolution of marriage. Sheppard *v.* Sheppard
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DIVORCE—*continued.*

4. —— *Decree Nisi—Intervention of King's Proctor—"Material Facts" withheld.*

The mere concealment of material facts is not the same as collusion which results in the concealment of material facts.

If, upon investigation of all the facts, the Court should be of opinion that, in the exercise of its discretion, a decree dissolving the marriage would have been pronounced, had all the facts been before it at the hearing of the petition, the mere fact of non-disclosure at that hearing is no ground for rescinding the decree then pronounced.

Alexandre v. *Alexandre*, (1870) L. R. 2 P. & M. 164, approved.

Butler v. *Butler*, (1890) 15 P. D. 66, discussed.

Roche v. *Roche*, [1905] P. 142, questioned and not followed. Hunter *v.* Hunter
Gorell Barnes Pres. 217

5. —— *Desertion and Adultery of Husband—Summary Jurisdiction (Married Women) Act,* 1895 (58 *&* 59 *Vict. c.* 39), *s.* 5 (*a*)—*Effect of Order made under Act.*

An order made under the Summary Jurisdiction (Married Women) Act, 1895, cannot extend, abridge, or alter the jurisdiction of the Divorce Division of the High Court of Justice under the Matrimonial Causes Acts; and s. 5 (*a*) of the Act of 1895 is to be read with the qualification that no order made under that Act can be treated as in any way ousting the jurisdiction of the Divorce Division. Smith *v.* Smith
Bargrave Deane J. 249

6. —— *Desertion by Petitioner conducing to Adultery of Respondent — Discretional Bar — Amended Prayer for Judicial Separation—Petition dismissed.*

In considering to what extent desertion, not a matrimonial offence in the Ecclesiastical Courts, is to be held now to be a bar to relief, the Court will especially have regard to the question whether it has conduced to the misconduct of the other spouse, the principles on which the Ecclesiastical Courts acted having been apparently to refuse relief to a petitioner found guilty of conduct conducing to the misconduct of the respondent.

Where the Court found that desertion by the petitioner had conduced to the adultery of the respondent:—

Held, that the petitioner was not entitled to a decree of judicial separation. Hodgson *v.* Hodgson and Turner **Gorell Barnes Pres. 233**

7. —— *Settlements—Petition for Variation of Marriage Settlement — Service — Respondent an uncertificated Bankrupt—One of the Trustees also an uncertificated Bankrupt and his Address unknown—Notice to Official Receiver in Bankruptcy—Service dispensed with.*

The Court dispensed with service of a petition to vary a settlement, made on a marriage now dissolved, in a case where the respondent and one of the trustees were uncertificated bankrupts and the address of the said trustee was not known, and where notice of the motion to dispense with service had been given to the chief official receiver in bankruptcy.

Snelling v. *Snelling*, (1890) 63 L. T. 263, followed. Gordon *v.* Gordon **Gorell Barnes J. 96**

DIVORCE—*continued.*

8. —— *Settlements—Practice—Variation of Settlements—No Issue of Marriage—Matrimonial Causes Act,* 1859 (22 *&* 23 *Vict. c.* 61), *s.* 5—*Interests of Unborn Persons—Consent of all living Persons interested—Reconveyance of Trust Property to Innocent Settlor.*

Where the only living persons who could be interested under the terms of a marriage settlement consented, the Court, upon the petition of the innocent settlor, whose marriage had been dissolved, and notwithstanding that the interests of unborn persons might be adversely affected, ordered the trustees to reconvey to the petitioner the whole of the settled property. Morrissey *v.* Morrissey - - - **Jeune Pres. 90**

9. —— *Settlements, Variation of—Dissolution of Marriage—Wife's Adultery—Husband's Adultery—Discretion of Court—Conduct of the Parties — Interests of Public Morality — Retrospective Order—Repayment of past Income—Wife's protected Life Interest—Jurisdiction—Matrimonial Causes Act,* 1857 (20 *&* 21 *Vict. c.* 85), *s.* 45; *Matrimonial Causes Act,* 1859 (22 *&* 23 *Vict. c.* 61), *s.* 5; *Matrimonial Causes Act,* 1878 (41 *&* 42 *Vict. c.* 19), *s.* 3.

In exercising the discretionary jurisdiction conferred upon the Court of varying settlements after a dissolution of marriage, regard must be had to the conduct of both the husband and the wife, and not of one party only, and also to the interests of public morality and decency.

A marriage had been dissolved at the suit of the husband on the ground of his wife's desertion and adultery, notwithstanding that the husband had, both before and after the presentation of his petition, himself been guilty of adultery, as was in fact admitted at the trial, he declining to tender himself for cross-examination. Both husband and wife had executed marriage settlements of their respective properties, the wife's settled property considerably exceeding the husband's. There were no children of the marriage.

Upon a petition by the husband for variation of the wife's settlement, under the discretionary power given to the Court by s. 5 of the Matrimonial Causes Act, 1859, as amended by s. 3 of the Matrimonial Causes Act, 1878, with a view to obtaining a direction for payment to him of part of the income of her settled property:—

Held, that, having regard to the admitted and unexplained misconduct of the husband himself and to the interests of public morality, the case was not one in which the Court should exercise its discretionary power by varying the wife's settlement in his favour.

The principles which should guide the Court in exercising its discretionary power of varying settlements considered and stated.

Chetwynd v. *Chetwynd*, (1865) L. R. 1 P. & M. 39, and *March* v. *March and Palumbo*, (1867) L. R. 1 P. & M. 440, considered and applied.

Noel v. *Noel*, (1885) 10 P. D. 179, distinguished.

The jurisdiction given to the Court to vary settlements under the Matrimonial Causes Acts cannot be exercised retrospectively; as, for

DIVORCE—*continued.*

instance, by directing the trustees of the wife's settlement to recoup to the husband accumulations of past income received by her under the trusts of his settlement.

A wife's protected life interest—that is, a life interest the personal enjoyment of which is to cease in certain events—is not an interest which the Court can control under s. 5 of the Matrimonial Causes Act, 1859, though the existence of such a life interest may be taken into consideration by the Court when making an order for variation of settlements.

Decision of Jeune P., [1903] P. 246, reversed. CONSTANTINIDI *v.* CONSTANTINIDI AND LANCE **C. A. 253**

10. —— *Wife's Petition—Adultery of Petitioner brought about under Duress and by Coercion of the Husband—Material fact—Suppression—Refusal of Decree.*

If a petitioner withholds from the Court, on the hearing of a petition for dissolution of marriage, the fact that she has committed adultery, such withholding of a fact is of itself a ground for refusing to make the decree absolute, even though the adultery is found, on a full investigation of all the facts of the case, to be such as would warrant the Court in granting the petitioner relief, and though, had the facts been fully disclosed to the Court in the first instance, it would, in the exercise of its discretion, have granted relief. ROCHE *v.* ROCHE (THE KING'S PROCTOR SHEWING CAUSE) **Bargrave Deane J. 142**

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ECCLESIASTICAL LAW—*Faculty—Enlargement of Chancel of Parish Church — Re-erection of Chancel East Wall containing historical painted Window presented by House of Commons—Consents required to removal and new position of Military Colours affixed to Chancel Walls under Faculty—Evidence of Assent of House of Commons to Application for Faculty.*

A faculty for the enlargement of the parish church of St. Margaret's, Westminster, by taking down and rebuilding the east wall of the chancel of the church six or seven feet further to the east and for other alterations in the church, including the re-erection and releading of the historical painted window at the east end of the chancel erected by the House of Commons, was granted, on the application of the rector and churchwardens with the consent of the parish vestry, on it appearing in evidence that official notice of the application for the faculty had been given to the then Speaker of the House of Commons, and that the assent of the members of the House of Commons to the works proposed by the faculty had been sufficiently shewn.

The temporary removal of certain military colours affixed to the walls of the chancel under a previous faculty (see *Vincent and Tomlinson* v. *Eyton*, [1897] P. 1) was authorized by the Court with the consent of the representative of the regiment to which the colours belonged. *In re* ST. MARGARET'S, WESTMINSTER **Consist. Ct. of London 286**

2. —— *Faculty—Second Communion Table—Chancel Screen with Gates—Refusal of Faculty for erection on Chancel Screen of Crucifix and Figures of Virgin Mary and St. John—Ancient Rood Stairs and Rood Loft Door—Proposed Restoration of pre-Reformation Screen and Rood—Evidence—Discretion—Superstitious Reverence.*

So much of an application for a faculty for a chancel screen and other works in a parish church as asked that the Court would sanction by faculty the placing above the centre of the chancel screen a sculptured group of life-size figures in oak, representing Our Saviour upon the Cross and the Virgin Mary and St. John, was refused where it appeared that, if the faculty was granted as prayed, the Court would be thereby authorizing the restoration of the pre-Reformation screen and rood formerly in the church.

The vicar and churchwardens of a parish church, in which the ancient rood stairs and rood door were still existing, petitioned the Ordinary for a faculty authorizing the placing in the church of a second Communion Table and a chancel screen with gates, having on its top a platform, gallery or loft on which the ancient rood door would directly open, and above its centre, upon a carved pedestal somewhat higher than the level of the loft floor, a sculptured group of life-size figures in oak representing Our Saviour upon the Cross and the Virgin Mary and St. John; the loft to be about six feet in width, and the cornice of the screen to stand on each side about a foot or eighteen inches higher than the loft floor. The suit was undefended, and it was proved in evidence that the services in the church were conducted strictly in accordance with the Book of Common Prayer, with extra services as allowed by the bishop of the diocese, subject to the Reservation of the Sacrament in certain cases. It was also proved that the church was left open in the daytime without a caretaker, and that the organ, the service books, and other articles of church furniture in the chancel required protection:—

Held, that the erection in the church of the pre-Reformation screen and rood as proposed in the identical positions occupied by them before the Reformation would, so far as related to the

ECCLESIASTICAL LAW—*continued.*

group of sculptured figures proposed to be placed on the screen, be unlawful, or if not unlawful be inexpedient, and that consequently a faculty must only be decreed for the chancel screen without the group of figures surmounting it.

A faculty was also granted for a second Communion Table; and the Court authorized the chancel screen being provided with gates, on the ground that sufficient necessity for a chancel screen with gates had been shewn in evidence. VICAR OF PAIGNTON *v.* ALL HAVING INTEREST
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INTESTACY—Administration—Divorce—Former husband passed over without citation—Sureties required to justify - 326
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JUDICATURE ACT—Collision—Action in personam — Foreign plaintiffs — Counter-claim—Security for damages - 47
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JUDICIAL SEPARATION—Amended prayer for—Discretional bar—Petition dismissed
See DIVORCE. 6. 233

JURISDICTION—Divorce — Variations of settlements - - - - - 253
See DIVORCE. 9.

—— Summary Jurisdiction (Married Women) Act, 1895—Effect of order made under Act - - - - - 249
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LATENT AMBIGUITY — Gift to "my grand-daughter"—Partial blank—Parol evidence—Grant of probate - - 129
See WILL. 2.

LUNACY—Probate—Practice—Lunacy of one of the executors after proving will - 92
See PROBATE. 6.

MARRIAGE—*Nullity of Marriage — Husband's Petition—Non-consummation—No Cohabitation—Respondent's Refusal to submit to Inspection—Evidence of Incapacity.*

Where there had been entire absence of cohabitation, incapacity to consummate on the part of the wife was found as a fact, on positive evidence arising from a statement made by herself, taken in conjunction with the general facts of the case and her refusal to submit to medical inspection. W. *v.* S. (OTHERWISE W.)
Gorell Barnes, Pres. 231

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See under DIVORCE.

MARRIED WOMEN.
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MATRIMONIAL CAUSES ACTS.
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MISCONDUCT—Administration—Grant—Citation—Widow passed over on ground of marital misconduct - - 140
See PROBATE. 7.

MUTUAL WILLS—Fresh will made by party who predeceases the other—Notice on death—No relief to survivor - 194
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NULLITY OF MARRIAGE—Non-consummation—Respondent's refusal to submit to inspection—Evidence of incapacity 231
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—— Costs—Appeal—Shipping—Salvage—Reduction of award—Apportionment 148
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—— Costs—Probate - - - 1, 3, n.
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—— Costs—Counter-claim—Security for damages—Collision—Action in personam—Foreign plaintiffs - - 47
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—— Service dispensed with—Petition for variation of marriage settlement—Bankruptcy 96
See DIVORCE.

PROBATE—*Administration—Intestacy—Divorce—Former Husband passed over without Citation—Probate Act,* 1857 (20 & 21 *Vict. c.* 77), *s.* 73—*Sureties required to justify.*

A divorced spouse, whether petitioner or respondent, ceases to have an interest in the estate of the other party to the dissolved marriage who subsequently dies intestate; and, in such a case, the Court will pass over the surviving spouse without citation, but, in granting administration to the next of kin, will require the sureties to the administration bond to justify. IN THE ESTATE OF WALLAS - - **Bargrave Deane J. 326**

2. —— *Administration pending Suit—Concurrent Suits in Chancery and Probate Divisions—Creditors—Sureties—Practice.*

In a creditors' action in the Chancery Division for the administration of the estate of a deceased person, the defendants in that action being respectively the plaintiffs and defendants in a probate suit relating to the testamentary documents of the deceased, the Probate Division, on the application of the plaintiffs in the Chancery action, who were, however, not parties to the probate suit, appointed as administrators pendente lite the same persons who had been appointed receivers by the Chancery Division, and with the same surety. IN THE ESTATE OF CLEAVER **Gorell Barnes Pres. 319**

3. —— *Costs—New Rule—Practice—Rules of Supreme Court, Order* LXV., *r.* 14 (*d*).

Under the additional rule (Order LXV., r. 14 (*d*)), the Court ordered the costs of both plaintiff and defendant to be charged on and paid out of the corpus of certain real estate devised by the will to successive life tenants.

[In another case, the costs of all parties were ordered to be paid out of the residuary shares of four defendants (there being six in all, interested under the will in the residuary estate of the testator), these four defendants being held to have caused the litigation.] DEAN *v.* BULMER **Jeune Pres. 1**

4. —— *Costs—New Rule—Practice—Rules of Supreme Court, Order* LXV., *r.* 14 (*d*).

In pronouncing for the will, the Court ordered that the costs of all parties be paid out of that portion of the residuary estate passing under the will to four out of the six defendants. HARRINGTON *v.* BUTT - **Gorell Barnes J. 3, n.**

5. —— *Dependent Relative Revocation—Unfulfilled Intention to execute fresh Will.*

The doctrine of dependent relative revocation may apply to a case where the document intended to be substituted for that which was destroyed is non-existent and has never existed as a valid testamentary paper. (So *held* by Gorell Barnes J.)

Upon a finding of fact that the testator destroyed his will with the intention that it should be revoked conditionally on his executing a fresh will:—

Held (by Gorell Barnes J.), that, as he did not execute a fresh will, the will destroyed was entitled to probate. DIXON *v.* SOLICITOR TO THE TREASURY - - - **Gorell Barnes J. 42**

6. —— *Lunacy of one of the Executors after proving Will—Revocation of Probate—Fresh Grant to remaining Executors—Form of Grant—Practice.*

Where one of three executors, who had proved a will, subsequently became of unsound mind, the Court, on the application of the others, revoked the grant and made a fresh grant of probate to

PROBATE—*continued.*

the applicants, reserving power to the lunatic, in case he should become of sound mind and apply, to join in the probate. In the Estate of Shaw
Gorell Barnes J. 92

7. —— *Misconduct — Administration — Grant —Citation—Practice—Administration of Estates Act*, 1529 (21 *Hen.* 8, *c.* 5)—*Widow passed over on Ground of Marital Misconduct.*

On an application for a grant of administration to the son of an intestate, passing over the widow on the ground of marital misconduct, which had been established in a suit by the intestate, the Court made the grant to the son without requiring the widow to be cited.

In the Goods of Middleton, (1888) 14 P. D. 23, distinguished. In the Estate of Frost
Bargrave Deane J. 140

8. —— *Mutual Wills—Fresh Will made by Party who predeceases the other—Notice on Death —No Relief to Survivor.*

Where two persons have made an arrangement as to the disposal of their property and executed mutual wills in pursuance of that arrangement, the one of them who predeceases the other dies with the implied promise of the survivor that the arrangement shall hold good; and if the survivor, after taking a benefit under the arrangement, alters his will, his personal representative takes the property upon trust to perform the contract, for the will of the one who has died first has, by the death, become irrevocable. But, on the contrary, where the one who dies first has departed from the bargain by executing a fresh will revoking the former one, the survivor, who has, on the death of the other party to the arrangement, notice of the alteration, cannot claim to have the later will of the deceased set aside or modified, either by way of declaration of trust or otherwise. Stone *v.* Hoskins
Gorell Barnes Pres. 194

9. —— *Sureties dispensed with—Practice—Administration—Nominee of Board of Education.*

The Court dispensed with sureties to the administration bond where the person applying for administration was a nominee of the Board of Education. In the Estate of Bryan. Board of Education *v.* Reubell - **Jeune Pres. 88**

10. —— *Will— Codicil —Revocation—Inconsistency—Admission to Probate—Codicils of same Date—No Evidence of Priority of Execution—Partial Inconsistency.*

Primâ facie every testamentary document duly executed in accordance with the provisions of the Wills Act ought to be admitted to probate. But, if there are two testamentary documents of the same date and it cannot be ascertained which of them was executed first, and their provisions are so inconsistent that they cannot stand together, the presumption in favour of admissibility will be rebutted, and neither document will be admitted to probate.

But when the provisions of two testamentary documents, the priority of which is uncertain and in neither of which there are express words of revocation, are apparently inconsistent, the Court will endeavour so to construe the words that if possible the two documents may stand together and may both be admitted to probate as expressing together the whole testamentary intention of the testator.

The statement of the law in Williams on Executors, 7th ed. vol. i. p. 162; 9th ed. vol. i. p. 138, approved and adopted.

A testatrix executed two codicils, both dated the same day, their provisions being to some extent inconsistent. The evidence of an attesting witness proved, in the opinion of the Court of Appeal, that the two codicils were executed on the same occasion and practically simultaneously. There was nothing to shew which was in fact executed first. Gorell Barnes J. refused to admit either codicil to probate, on the ground that an introductory clause in each shewed that it was intended to operate only in the event of the testatrix surviving her husband, whereas she died before him:—

Held, by the Court of Appeal, that, on the true construction of the introductory clause, the codicils were not contingent or conditional, but were intended to operate in any event:

Held, also (by Vaughan Williams and Romer L.JJ., Cozens-Hardy L.J. doubting), that the provisions of the two codicils were not so inconsistent that they could not stand together, and that both ought to be admitted to probate. Townsend *v.* Moore - - - **C. A. 66**

—— Administration (with will annexed) to residuary legatee — Absolute gift cut down, by later words, to life interest
See Will. 1. **321**

—— Illegitimate child born after date of will, Probate granted to - - **137**
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—— Will — Latent ambiguity — Gift to "my grand - daughter" — Partial blank — Parol evidence—Grant of probate **129**
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PUBLIC MORALITY — Interests of — Divorce — Variation of settlements—Discretion of Court - - - - **253**
See Divorce. 9.

QUEENSTOWN HARBOUR—Collision—Narrow channel - - - - **106**
See Shipping. 10.

RECONVEYANCE—Trust property to innocent settlor — Variation of settlements — No issue of marriage - - - **90**
See Divorce. 8.

RETROSPECTIVE ORDER—Divorce—Variation of settlements—Discretion of Court **253**
See Divorce. 9.

REVIVAL — Condonation—Adultery—Desertion —Decree of dissolution of marriage **94**
See Divorce. 2.

REVOCATION—Dependent relative revocation—Unfulfilled intention to execute fresh will - - - - - **42**
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—— Probate—Lunacy of one of the executors after proving will - - - **92**
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REVOCATION—*continued.*

—— Will—Codicil—Inconsistency—Admission to probate - - - - 66
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RIVER—Shipping—Collision.
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RULES OF SUPREME COURT—Order XVI. rr. 48, 52, 53, 55—*Parties* - 155
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—— Order LXV., r. 14 (*d*)—*Costs* - 1, 3, n.
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SALVAGE—Appeal—Practice—Reduction of award—Apportionment—Costs - 148
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SECURITY—Divorce—Wife's costs—Previous order for separation—Effect - 185
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—— Security for damages—Collision—Action in personam—Foreign plaintiffs—Counterclaim - - - - 47
See Shipping. 9.

SEPARATION—Divorce—Wife's costs—Previous order for separation—Effect - 185
See Divorce. 3.

SERVICE—Variation of marriage settlement, Petition for—Bankruptcy - 96
See Divorce. 7.

SETTLEMENT—Divorce—Variation of settlements—Jurisdiction - - 253
See Divorce. 9.

—— Variation of settlement—No issue of marriage—Interests of unborn persons 90
See Divorce. 8.

—— Variation of settlement—Service dispensed with—Respondent an uncertificated bankrupt—One of the trustees also an uncertificated bankrupt and his address unknown - - - - 96
See Divorce. 7.

SHIPPING—*Collision—Appeal—Both to blame—Practice—Costs.*

In the Admiralty Court the plaintiffs' vessel was found alone to blame for a collision with the defendants' vessel. The plaintiffs, admitting that their vessel was to blame, appealed on the ground that the defendants' vessel was also to blame. The Court of Appeal found the defendants' vessel also to blame, and with reference to the costs, settled the practice by following *The Ceto*, (1889) 14 App. Cas. 670, and giving the successful appellants their costs of the appeal. The London - - - - C. A. 152

2. —— *Collision—Crossing and Narrow Channel Rules—Red Light on the Starboard Bow—Regulations for Preventing Collisions at Sea*, 1897, *arts.* 19, 21, 22, 23, 25.

The plaintiffs' steam vessel inward bound to, and the defendants' steam vessel outward bound from, Grimsby, were at the material time red to green in a position of danger, and owing to the incoming vessel hard-a-porting, and the outgoing vessel starboarding, came into collision close to the Clee Ness buoy at the entrance to the river Humber:—

Held, by Gorell Barnes J., that both vessels were to blame, for the waterway at the entrance to the Humber, between the Bull and Clee Ness buoys on the south side, and the buoys on the north side, is a narrow channel within the meaning of art. 25 of the Regulations for Preventing Collisions at Sea, and therefore the plaintiffs' incoming vessel was in her wrong water, and, whether that article applies or not, the nature of the locality and the position of the buoys make it necessary for the incoming vessel to keep well over to the northward, so as to allow the outgoing vessel sufficient room to pass round Clee Ness buoy:

Secondly, as the defendants' vessel was coming out from Grimsby and the plaintiffs' vessel was in the main stream, the two steam vessels were at the material time prior to the collision "crossing so as to involve risk of collision" within the meaning of art. 19 of the same regulations, and, therefore, it was the duty of the defendants' vessel, having the other on her own starboard side, to keep out of the way, for which purpose she should not have attempted, in breach of art. 22, to cross ahead of the other, but should have ported to the red light of the incoming vessel, or, if that were dangerous, owing to the proximity of the Clee Ness buoy, she should have waited until the incoming vessel had passed, whilst that vessel, instead of porting, should, under art. 21, have kept her course and speed, or, assuming that the crossing rule did not apply, then the incoming vessel, on seeing the green light of the outgoing vessel on her port bow in a position of danger, should have stopped and reversed, whilst the outgoing vessel seeing that the red light of the incoming vessel was not broadening on her starboard bow, and, therefore, that she was porting, should at once have stopped and reversed. The Ashton
Gorell Barnes J. 21

3. —— *Collision — Damage — Compulsory Pilotage — Trinity House Outport District — Termination of Voyage — "Into and out of" Harwich Harbour—Merchant Shipping Act,* 1894 (57 & 58 *Vict. c.* 60), *ss.* 622, 633.

The defendants' steam vessel, inward bound from a foreign port, was boarded outside Harwich Harbour by a pilot duly licensed to pilot "into and out of" Harwich Harbour, at rates fixed according to draft of water, and she was brought by him to an anchorage in a proper place inside the harbour. Here the vessel waited until the tide had risen sufficiently, and she was then taken by the pilot to her discharging quay; but, whilst he was in the act of berthing her, she came into collision with, and damaged, the plaintiff's vessel. It was admitted that pilotage was compulsory "into" the harbour, but it was contended that the defendants were liable for the damage sustained by the plaintiff's vessel on the ground that the compulsion ceased on the vessel being safely anchored, and that the work connected with the transit from the place of anchorage to the discharging quay, and the berthing of the vessel, was voluntary on the

SHIPPING—*continued.*

part of the pilot in consideration of a small charge varying with the tonnage, paid by the ship by usage, and recognised by the authorities of the Trinity House:—

Held, by Gorell Barnes J., that the defendants were not liable, for neither the temporary anchorage, nor the charge for berthing, made any difference, as the vessel was under compulsory pilotage until she reached her destination in the harbour. THE OLE BULL **Gorell Barnes J. 52**

4. —— *Collision — Damage — Freight — Abandonment of Voyage—Claim by Cargo Owner —"Substituted Expense."*

A collier from the Tyne to Cape Town, under charter to the Admiralty, came into collision with a steamship in the English Channel and put back to the Thames for repairs. The cargo of coals had to be discharged, and, by arrangement between the Admiralty, as the owners of the cargo, and the owners of the collier, the voyage was treated as abandoned, the cargo sold, and a sum of 1000*l.* agreed to be paid by the Admiralty to the owners of the collier as a "substituted expense" in lieu of the larger sum which, it was estimated, would have been incurred for storage and reshipment if the collier had carried on the coals at the end of the period required for repairs.

At the usual ships' reference, after a decree of both to blame, a moiety of the claim by the owners of the collier for repairs and detention was paid by the owners of the steamship; but, at a reference between the Admiralty and the owners of the steamship, a claim, made by the Admiralty against the owners of the steamship for a moiety of their adjusted proportion of the 1000*l.*, was disallowed by the registrar, and the disallowance affirmed on appeal to the judge, [1904] P. 202.

Held, by the Court of Appeal (Collins M.R., Mathew and Cozens-Hardy L.JJ.), reversing the decision of Bucknill J., that the amount claimed by way of "substituted expense" was the result of a reasonable arrangement to minimise the loss, and was such a consequence of the collision as to render the owners of the steamship, as wrong-doers, liable for a moiety of their adjusted proportion.

The Marpessa, [1891] P. 403, considered. THE MINNETONKA - - - **C. A. 206**

5. —— *Collision—Damage—Tug and Tow—Third Vessel—Pilot cutter lashed to Tow—Independent Duty of Tug to avoid Danger—Identification — Reasonable Care — Joint Tortfeasors—Costs.*

Two tugs were towing a sailing vessel, in charge of a pilot, down the Bristol Channel, with a pilot cutter made fast to the sailing vessel, when, owing to the negligence of the tow and her tugs, the pilot cutter was sunk by collision with a schooner, which was also damaged. In an action by the owners of the pilot cutter against the owners of the schooner and the owners of the tugs, in which the owners of the schooner counter-claimed against the pilot cutter and the tugs, it was held in the Court below (*The Harvest Home*, [1904] P. 409) that, on the authority of *The Altair*, [1897] P. 105, the pilot cutter and the schooner were entitled to succeed against the tugs, for, though those in charge of the tow were negligent in not properly directing the tugs, an independent duty was cast upon the tugs to exercise reasonable care and skill in keeping clear of the schooner, and further, following *The Bernina*, (1888) 13 App. Cas. 1, that the pilot cutter was not identified with the sailing vessel so as to be unable to recover.

On appeal by the owners of the tugs against the owners of the pilot cutter:—

Held, by the Court of Appeal (Collins M.R., Mathew and Cozens-Hardy L.JJ., assisted by nautical assessors), that though the pilot cutter was lashed alongside the tow, those in charge of her were nevertheless bound to take reasonable care to avoid danger, and, had they kept a good look-out, they would have seen the schooner in time to have slipped the rope and gone clear. The pilot cutter was, therefore, also to blame, and the liability of the owners of the tugs thereby reduced to a moiety of the claim of the owners of the pilot cutter, without reference to the liability of the tugs in respect of the damage to the schooner, and, in accordance with the Admiralty rule, each party must pay their own costs in the Court below and of the appeal. THE HARVEST HOME - - - - **C. A. 177**

6. —— *Collision—Damage by two Collisions—Simultaneous Repairs—Dock Dues—Demurrage—Division between Tortfeasors.*

In order to effect repairs necessitated by two collisions for which the owners of two wrong-doing vessels were liable, the plaintiffs, the owners of the damaged vessel, put her into dry dock, and proceeded to repair at the same time the separate damage sustained in each collision; but the defendants, the owners of the wrong-doing vessel in the second collision, objected to pay any portion of the dock dues on the ground that the repair of the damage caused by their vessel occupied a shorter time than that required for the repair of the damage sustained in the first collision, so that the plaintiffs had not been put to any additional expense:—

Held, by the Court of Appeal (Collins M.R. and Romer L.J.), reversing the decision of Sir Gorell Barnes, President, that the principle as to apportionment of expenses between owner and underwriter in respect of dry-docking for simultaneous work on the vessel, laid down in *The Vancouver*, (1886) 11 App. Cas. 573, and explained in *The Ruabon*, [1900] A. C. 6, applied, and, therefore, the defendants were liable for a proportion of the dry-docking and incidental expenses, excluding demurrage. THE HAVERSHAM GRANGE **C. A. 307**

7. —— *Collision—Damage to Cargo—Towage—Contract of Indemnity—Third-party Notice—Appeal by Person not a Party—Rules of Supreme Court, Order XVI., rr. 48, 52, 53, 55—Costs.*

Cargo owners instructed barge-owners to lighter their goods, and, as time pressed, to employ a tug. The tug was so negligently navigated by the servants of the tug-owners that the barge containing the goods was brought into

SHIPPING—*continued.*

collision with another barge, and the goods thereby damaged. In an action by the cargo owners, as plaintiffs, against the barge-owners and the tug-owners as co-defendants, the barge-owners were dismissed from the suit with costs to be paid by the cargo owners, but the tug-owners were held liable with costs for the damage sustained by the cargo owners, together with the costs to be paid by the cargo owners to the barge-owners. The tug-owners, by a third-party notice, served on the barge-owners, set up a contract of indemnity under which their customers agreed that the tug-owners should "not be answerable for any loss or damage which might happen to, or be occasioned by, any barge, or its cargo, while in tow, however such loss or damage might arise," and undertook to hold them harmless and indemnify them "from any such loss or damage, and against the faults or defaults of their servants or any claim therefor by whomsoever made."

Under the issue raised between the co-defendants by the third-party notice, the barge-owners were adjudged responsible for the amount of the damage for which the tug-owners had been held liable together with the two sets of costs. Both defendants served notices of appeal; but the appeal of the tug-owners was subsequently withdrawn:—

Held, by the Court of Appeal (Collins M.R., Mathew and Cozens-Hardy L.JJ.), first, that the barge-owners could not appeal in respect of the decision in favour of the plaintiffs against the tug-owners, for they were not parties to that judgment, and not having paid the amount adjudged to be due by the tug-owners to the plaintiffs, they were not subrogated to their rights, and, if subrogated, they could not avail themselves of an appeal which the tug-owners had abandoned, nor could they rely on the third-party procedure under the Judicature Act, as no order had been made within the meaning of the Rules of the Supreme Court, Order XVI., r. 53, giving directions as to the mode in, or the extent to, which they were to be bound, or made liable, by the judgment against the tug-owners. Secondly, affirming the judgment of the Court below, that there was no privity of contract between the plaintiffs, the owners of the damaged cargo, and the tug-owners, which would bind the plaintiffs to the conditions attached to the towage, and, therefore, on the construction of the contract of indemnity as between the barge-owners and the tug-owners, the barge-owners not only could not bring an action against the tug-owners for any loss or damage which might happen to, or be occasioned by, any barge or its cargo, but the contract assumed an existing liability against which the barge-owners had undertaken to indemnify the tug-owners, so that the barge-owners were liable for the damages recovered by the plaintiffs in the action brought against the tug-owners, together with the costs reasonably incurred by the tug-owners in defending such action, including the costs which the plaintiffs had been adjudged to pay the barge-owners, and which the tug-owners had been ordered to repay to the plaintiffs. THE MILLWALL **C. A. 155**

8. —— *Collision—Fog—Fog Signal forward of Beam—Duty to stop Engines—Regulations for Preventing Collisions at Sea*, 1897, *art.* 16.

Two steam vessels, proceeding in opposite directions, came into collision during a dense fog off the coast of Portugal. Those in charge of the plaintiffs' vessel did not "stop her engines" in accordance with art. 16 of the Regulations for Preventing Collisions at Sea, on "hearing, apparently forward of her beam, the fog signal of" the defendants' vessel, because another vessel was sounding her whistle apparently on the port quarter and overtaking her; whilst those in charge of the defendants' vessel alleged that they did not stop her engines on first hearing the whistle of the plaintiffs' vessel, because two other vessels sounding their whistles, one on each bow, helped to ascertain the position of the defendants' vessel, which was a long way off, and as soon as the whistle was distinctly made out to be on the starboard bow the engines were stopped:—

Held, by Gorell Barnes J., that both vessels were to blame, as both had infringed the positive directions as to stopping the engines contained in art. 16. In the case of the plaintiffs' vessel, it would have been incumbent on the alleged overtaking vessel to have stopped when she heard the whistle of the plaintiffs' vessel indicating that she was stopped, so that any danger would have been averted. In the case of the defendants' vessel, as distance and bearing cannot be at once definitely determined in fog, it was no excuse for a breach of the rule that the whistle of the other vessel was heard apparently a long way off. THE BRITANNIA - - - **Gorell Barnes J. 98**

9. —— *Collision—Practice—Action in Personam—Foreign Plaintiffs—Counter-claim—Security for Damages—Admiralty Court Act*, 1861 (24 *&* 25 *Vict. c.* 10), *s.* 34—*Judicature Act*, 1873 (36 *&* 37 *Vict. c.* 66), *s.* 24, *sub-ss.* 5, 7.

The foreign owners of a tug, sunk in collision in the English Channel with a British vessel, brought an Admiralty action in personam against the owners of the British vessel, who appeared, counter-claimed, and applied that all proceedings in the action might be ordered to be stayed until the foreign plaintiffs gave security for damages under the counter-claim:—

Held, by the Court of Appeal (Collins M.R. and Stirling L.J.), affirming the decision of Gorell Barnes J., that there was no jurisdiction to make the order, either under the special powers conferred on the Admiralty Court by s. 34 of the Admiralty Court Act, 1861, or under the general powers of the Courts of Law and Equity kept alive, and conferred on the High Court and the Court of Appeal, by sub-ss. 5, 7 of s. 24 of the Judicature Act, 1873. THE JAMES WESTOLL **C. A. 47**

10. —— *Collision — Queenstown Harbour — Narrow Channel — Regulations for Preventing Collisions at Sea*, 1897, *art.* 25.

The waterway forming the entrance to Queenstown Harbour is a narrow channel within the meaning of art. 25 of the Regulations for Preventing Collisions at Sea, and, therefore, every steam vessel must, when it is safe and practicable, keep to that side, marked by buoys by the local authorities, of the fairway or mid-channel which

SHIPPING—*continued.*

lies on the starboard side of such vessel. THE GLENGARIFF - - **Bargrave Deane J. 106**

11. — *Collision—Sea Reach, River Thames—Starboard Hand Buoys—Narrow Channel—Regulations for Preventing Collisions at Sea*, 1897, *art.* 25.

The plaintiffs' steam vessel proceeding up, and the defendants' steam vessel going down, the river Thames, came into collision on the starboard side, as regards the incoming vessel, of the channel which lies to the southward of the four red conical lighted buoys, placed by the duly constituted authority, approximately in the central line of Sea Reach, to mark the northern side of the deepest water. On the question whether the plaintiffs' vessel was on the wrong side of the river:—

Held, by Gorell Barnes J., that the effect of the placing of the four red conical lighted buoys was to constitute the space of water between them, and the Nore Sand buoys to the south of them, a narrow channel within the meaning of art. 25 of the Regulations for Preventing Collisions at Sea, for, by the uniform system of buoyage adopted on the coast of England, red conical buoys are "starboard hand buoys" denoting that side which would be on the right hand of the mariner entering the river, and, therefore, the plaintiffs' vessel was justified in being where she was.

Quære, as to the effect of the starboard hand buoys with reference to that portion of the waterway between those buoys and the buoys on the northern side of the river. THE GUSTAFSBERG **Gorell Barnes J. 10**

12. —— *Collision—Solent, Collision in the—Damage—Narrow Channel—Regulations for Preventing Collisions at Sea*, 1897, *art.* 25—*Compulsory Pilotage—Trinity House Outport District—Merchant Shipping Act*, 1894 (57 *&* 58 *Vict. c.* 60), *ss.* 605, 622.

The waterway known as the Solent constitutes a narrow channel within the meaning of art. 25 of the Regulations for Preventing Collisions at Sea, and, therefore, every steam vessel must, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel.

Under the statutory jurisdiction exercised by the Trinity House of Deptford Strond since 1808 in respect of outport districts, the waterway between the sea and Southampton, by way of the Solent, has always constituted, for the purposes of compulsory pilotage, one district only, although for the convenient examination and control of the pilots licensed by the Trinity House, that corporation, as the pilotage authority, has from time to time divided the district amongst sub-commissioners at Portsmouth, Cowes, and Southampton, and although the limits of the licences of the pilots in respect of the district have been varied, and exclusive rights given to Southampton pilots in respect of the pilotage of inward-bound vessels when arriving at the seaward end of Southampton Water. THE ASSAYE **Bargrave Deane J. 289**

13. —— *Collision — Tug and Tow — Fog — Regulations for Preventing Collisions at Sea*, 1897, *art.* 16—*Obligation on Tug to stop—Control of Tug by Tow.*

A steamship proceeding in a dense fog up the English Channel at a moderate speed on a course of E. ½ N. stopped her engines, in accordance with the second paragraph of art. 16 of the Regulations for Preventing Collisions at Sea, on hearing a fog signal apparently forward of her beam, and on hearing a second signal reversed; but she came into collision with a sailing vessel in tow of a tug proceeding on a crossing course of W.S.W. at a moderate speed of from two to three knots. The whistle of the steamship had been heard fine on the starboard bow of the sailing vessel; but the engines of the tug were not stopped in accordance with the above regulation, on the ground that as the tug was proceeding at the minimum speed compatible with keeping the tow under control, it was not the duty of the tug to stop:—

Held, by the Court of Appeal (Collins M.R., Mathew and Cozens-Hardy L.JJ., assisted by nautical assessors), affirming the decision of Gorell Barnes J., [1904] P. 41, that the steamship was not to blame as she had complied with the rule by stopping, and was not bound to reverse before she did so; but that both tug and tow were to blame, as it was practicable for the tug to have stopped her engines and let the way run off the tow. THE CHALLENGE AND DUC D'AUMALE **C. A. 198**

14. —— *Collision — Vessels crossing River — Tyne By-laws*, 1884, *arts.* 21, 22.

The meaning of arts. 21 and 22 of the Tyne By-laws—by which a vessel "requiring to pass over a part of the channel which is not within that half reserved for its navigation," and when "crossing the river . . . . shall be navigated so as not to cause obstruction, injury, or damage to any other vessel"—is that those in charge of a crossing vessel on seeing that there is time and opportunity to cross without causing obstruction may do so, and any other vessel must act reasonably in respect of the crossing vessel, so that, if a little more room is required to assist the crossing vessel, that room must be given. The vessel crossing takes, however, upon herself, at the outset, the responsibility of being able to do so safely with reference to the passing traffic—that is, those in charge of her are put to their election whether they will cross and call upon a passing vessel to take the ordinary precautions to avoid collision, or whether they will stop where they are and allow that other vessel to pass, in either case not hampering or misleading the other vessel, but clearly and unmistakably indicating to that other vessel the course which they intend to pursue. THE SKIPSEA - **Gorell Barnes J. 32**

15. —— *Salvage—Appeal—Practice—Reduction of Award—Apportionment—Costs.*

On appeal in a salvage suit, the defendants succeeded in substantially reducing the award, namely, from 5100*l.* to 3000*l.*:—

Held, by the Court of Appeal (Collins M.R., Mathew and Cozens-Hardy L.JJ.), that in such cases the ordinary rule in the Court of Appeal, that a successful appellant is entitled to the costs of the appeal, would prevail, notwithstanding

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the general rule to the contrary laid down in *The Gipsy Queen*, [1895] P. 176, based on the earlier practice of the Privy Council when exercising jurisdiction in Admiralty cases. THE TOSCANA C. A. 148

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WILL—*Absolute Gift cut down, by later Words, to Life Interest—Administration (with Will annexed) to Residuary Legatee—Will—Construction.*

A will made upon a printed form with holograph additions purported to leave all property both real and personal belonging to the testator to the testator's wife "for her own absolute use and benefit . . . . subject only to the payment of" debts and funeral and testamentary expenses, the wife being appointed sole executrix . . . . "and

WILL—*continued.*
after her death to come absolutely to" M. A. H. "to her and her heirs for ever" after payment of 20*l.* to two sisters (named) of M. A. H.:—

Held, that, looking at the terms of the whole will, the widow took only a life estate, and that M. A. H., as residuary legatee, was entitled to a grant of administration with the will annexed, in preference to the executor of the widow, who had died without taking probate of the will in question. IN THE ESTATE OF LUPTON
Gorell Barnes Pres. 321

2. —— *Ambiguity, Latent — Gift to "my Grand-daughter"— Partial Blank — Parol Evidence—Grant of Probate.*

Although a complete blank in a will cannot be filled up, a partial blank may be explained by extrinsic evidence.

Thus, where a testatrix appointed as executrix and legatee a person described in the will as "my grand-daughter ——," evidence was admitted for the purpose of explaining the latent ambiguity which arose from the fact that, at the date of the will and at the date of the death, the testatrix had three grand-daughters, and the will was thereupon pronounced for, and probate was granted to the one whom the Court found, from the extrinsic evidence, to be the person intended by the testatrix. IN THE ESTATE OF HUBBUCK
Gorell Barnes Pres. 129

3. —— *"Children belonging to me"—Illegitimate Child—Distinction between Will of Mother and Will of Father of Illegitimate Child or Children —Probate granted to Illegitimate Child born after date of Will—Construction of Will.*

A distinction is to be drawn between benefits conferred by deed or will upon future illegitimate children, according to whether the person purporting to confer the benefit is the mother or the father.

A spinster made a will in 1876 by which she purported to leave her property in trust for all the children who might belong to her at the date of her death. In 1878 she gave birth to an illegitimate child, who survived her:—

Held, that the child was entitled to take under the will. IN THE ESTATE OF FROGLEY
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LONDON: PRINTED BY WILLIAM CLOWES AND SONS, LIMITED,
DUKE STREET, STAMFORD STREET, S.E., AND GREAT WINDMILL STREET, W.

BIBL. LONDIN UNIV.